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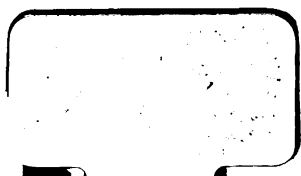
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THE QUARTERLY LAW JOURNAL.

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LIEN OF THE "FIERI-FACIAS" UNDER THE CODE OF VIRGINIA.

One of the most important objects in a Code of Laws for the administration of civil justice, is to provide prompt and effectual means for the enforcement of judgments for debt. In executing the revision of the Code of Virginia, which commenced in the year 1846, and terminated in the summer of 1849, no subject engaged more of the anxious thought and laborious care of the Revisors, the Committee of Revision in the Legislature, and the Legislature itself. When the Revision commenced, the law furnished the following machinery for the purpose of enforcing judgments.

1. A writ of *fi. fa.*, by which "the property of the goods" of a debtor might be taken to satisfy it (if levied before the return day of the writ) if any such were found in the county of the sheriff in whose hands the writ was,

2. A writ of *Elegit*, by which all the goods of the debtor, saving his oxen and beasts of the plough, and one moiety of the *lands* of the debtor, might be taken and delivered to the creditor, "by reasonable price and extent,"—which personal property the creditor was to hold as his own proper goods and chattels, and the moiety of the land as his freehold, until he shall have levied thereof the debt and damages."

3. A writ of *Ca Sa*, by which the sheriff was to take the debtor, and keep him in jail until he paid the debt, or delivered to the sheriff personal property to the value of the debt or took the oath of an insolvent debtor and surrendered all his property, real and personal, all his choses in action, in his possession or held in trust for him, and such estate as he did not surrender was to be vested in the sheriff of the county wherein such *lands, tenements, goods, or chattels* shall lie or be found. This last provision has been construed to apply to choses in action not

surrendered, as well as other personal estate. *Clough v. Thompson*, 7 *Grat.* 26.

It was obvious enough, that the writ of *fieri facias* was a proper and generally an all sufficient remedy in cases where the debtor had personal property, known to the sheriff, to whom the execution was delivered, sufficient to pay the debt. But even this was not a perfect remedy, for although a levy was made on property sufficient to pay the debt; yet the property might perish or might escape without default of the creditor or the sheriff, or might not sell for enough to pay the debt. And as the debtor might, in the mean time, alienate the residue of his property, and convert it into money or bank notes, or invest it in stocks, or other choses in action, or employ it in the payment of other creditors by voluntary payment, the execution creditor might find himself deprived of the fruits of his superior diligence, by reason of the inadequate means furnished by the law for the enforcement of his execution.

By *Elegit*, a creditor who had sued for a debt, and got a judgement, that he should have money, was compelled to become the purchaser of a part of his debtor's personal property, and the renter of half his lands at a price to be fixed by a jury, and to hold it long enough to get his debt, if he could, out of it. The service of the *Elegit* was in law a satisfaction of the execution, whether he could ever get satisfaction out of the property recovered or not. Such a remedy, (to say nothing of numerous practical difficulties in the way of reaping the fruit of the remedy, such as the difficulty of getting possession of his one half of the land—the necessity of going into equity to have a sale of it, if the rents would never pay the debt,) was little better than a mockery. It was therefore scarcely ever resorted to, except by a subsequent judgment creditor in order to get priority over a prior judgment creditor, who, sensible of the inefficiency of the *Elegit*, had resorted to the only remaining remedy against the debtor, viz: a *Ca Sa*.

While under the *Elegit*, a creditor entitled to money could only become a forced purchaser of personal property, which he probably did not want, and a renter of land—under the *Ca Sa*, instead of getting his money, his debtor was to be a prisoner, as long as he preferred enjoying the possession of his property, to paying his execution creditor: and his creditor got satisfaction of his debt by fulfilling the amiable and agreeable function of a jailor as long as his debtor required, and he was willing to pay the jail fees. But this curious and incongruous means of getting payment of money was to a great extent illusory and ineffectual,—for although the statute of 1819 made the levy of a *Ca Sa* a lien on all the real estate (and seemed

therefore preferable to the *Elegit*, which only rented one half to the creditor,) and the statute of 1820—1821 made it a lien on all "the property of the goods of the debtor" (that is on all the personal property capable of being levied on by a *fi. fa.*) yet these liens were merely *inchoate*, until the debtor swore out of jail, and *gone* if the debtor died in prison. And if a subsequent judgment creditor sued out an *Elegit*, before the debtor swore out of jail, he was entitled to priority of satisfaction as to a moiety of the lands, notwithstanding the lien of the prior *Ca Sa*, executed.—*Foreman v. Lloyd*, 2 Leigh, 284, and two or more *Elegit* creditors of the same term proceeding together, took the whole land.

These three modes of enforcing judgment by execution were all the machinery furnished by the law, and each and all were defective in not providing means, by which current money and bank notes, stocks, bonds, and other securities for money or debts could be compulsorily made available to the payment of the execution creditor—none of them gave any lien on *such* assets of the debtor, but under each, and in spite of each and all, the debtor might collect the principal, interest, or dividends, as well as the rents and profits of his other property, and appropriate them in support of his family, or sell and transfer them in payment of any of his debts, whether due by judgment, bond, note, or open account, up to the time he swore out of jail or died in jail.

The *Ca Sa* was ineffectual for another reason. Debtors who had no property except real estate or choses in action, having reason to apprehend, or knowing of, the issuing of a *Ca Sa*, and naturally irritated with a creditor, who resorted to what every debtor regarded as a harsh and odious proceeding, would keep out of the way of the sheriff, until by deeds of trust, and assignments to *bona fide* creditors and purchasers, they had appropriated all their property, real and personal. And if this were done, although the assignees knew that a *Ca Sa* was in the hands of the sheriff, such assignments were valid because a *Ca Sa* was no lien on either real or personal property until executed by the seizure of the debtor's person. And, moreover, the effect of issuing the *Ca Sa* and serving it, was in law to destroy the lien of the judgment, and the creditor lost the poor benefit he might have had under an *Elegit*.—*Rogers v. Marshall*, 4 Leigh, 425.

In ninety-nine cases out of an hundred, therefore, in which a *Ca Sa* was sued out, even against a debtor who had property, the result was to defeat the creditor by execution, and compel him to begin a new pursuit, for his debt increased by the addition of the jail fees, which he had been compelled to pay.

The practical value of the *Ca Sa* was realized (in a few cases) where the debtor was wholly insolvent, but kept out of the way, or had removed from the Commonwealth, by fixing the debt on his innocent *tail*—a consequence condemned alike by reason, justice, and humanity.

Such being the state of the law of Execution, the nature of the revision, required by the law under which it was authorized, imposed the duty on all employed in that work, to remedy the defects in the existing laws, to provide the means by which the wise and just policy of securing the benefit of his superior diligence to an execution creditor, by priority of satisfaction out of the debtor's estate might be attained, without doing injustice to other creditors, or to *bona fide* purchasers, to abolish the inadequate remedy of imprisonment for debt, condemned by the general voice of American legislation, State and Federal,—and substitute therefor remedies more effectual for the creditor, and equal, and, if possible, greater securities for creditors and purchasers generally.

For these purposes revised laws were reported by the Revisors, as shown by their reports, and after having been thoroughly examined by the Committee of Revision, they were with some amendments, principally verbal, approved by them, and finally adopted by the legislature as they are now found in the Code, as Chapters 186, 187 and 188.

By the 1st and 2d Sections of Ch. 188, the *Ca Sa* was abolished, except in specified cases, arising before the Code took effect. This relic of barbarism has been wiped out of the Statute Book, to which it was so long a reproach; and it now belongs to the history of the past. An attempt to revive it would be about as hopeless as to re-enact the law of "*attaint*" against juries, or the punishment by the "*peine forte and dure*" for standing mute, or the old law of the Hebrews, by which creditors could seize their insolvent debtors and their children, and sell them as slaves. That the Revisors entered on this reform with hesitation, and only after the most cautious deliberation, is shown by what they say at p. 840 of their reports, in a note accompanying the bills reported to the Legislature on the subject of abolishing the *Ca Sa*, and the requisition of bail in civil actions. "We felt at first disinclined to venture on so bold an innovation, especially as, under existing laws, imprisonment for debt in fact occurs seldom, scarcely ever but where it is voluntary,—that is, where a debtor prefers to remain in jail rather than surrender his property for the payment of his debts. Still we learn there are some occasional instances of hardship and oppression; and some temporary imprisonment is unavoidable under the present laws. If as effectual securities for the

rights of creditors can be supplied by other means, certainly all will concur in the propriety of substituting them for the incarceration of the debtor. After careful reflection on the subject, we have come to the conclusion that no benefit results to a creditor from taking a debtor under a writ of *capias ad satisfaciendum*, or from his discharge under the insolvent laws, which cannot be attained by other means; and we think other sufficient means are substituted therefor in the chapters prepared by us in relation to judgments and executions."

And at page 843 of the Reports they say, "We will not undertake to say that the remedies, now proposed to be substituted in the place of process to take the body for debt, will, in every possible case, attain for the creditor everything that he can now attain by means of that process. But we express the opinion without hesitation, that in cases generally, the rights of creditors will be better protected by the measures proposed than by those for which they are substituted; at the same time that we get rid of the system of imprisonment for debt, which is regarded by so many as inconsistent with the liberal and enlightened spirit of the age."

These notes show the objects the Revisors had in view, the cautious hesitancy with which they entered upon the preparation of the measures to accomplish these objects, and the absence on their part of hasty rashness or deference for the clamor of demagogues.

Their reports show, that in the work of preparing those measures, the most laborious care was employed by them and by the Committee of Revision in agreeing upon the general provisions, and that a great deal of time was expended by them separately and together in scanning every Section, and every word of every Section, (as indeed was the case in the preparation of the whole Code,) with a view to comply with the law which required that the Rev. Statutes should be rendered "concise, plain, and intelligible."

The 186th Chapter provided, that the lien of a judgment should be on *all* the lands of the debtor instead of on one half only,—thus subjecting real estate to the whole extent to which it could be made liable under a *Ca Sa*. It made that lien operate from the date of the judgment, instead of making it depend on a *Ca Sa* being executed, and liable to be lost and extinguished by the death of the debtor, or his escape from prison without swearing out. It gave the remedy by *Elegit* against the *whole* land, and moreover gave an additional and much more beneficial and satisfactory remedy, by providing that the lien of the judgment might always be enforced in *Equity*, and authorized a decree for the sale of the land to satisfy the judgment, immediately upon its being ascertained, that the rents

of the real estate would not discharge the judgment in five years. It would have been better to have authorized a sale, by the Court of Equity at once and in terms, of the whole land, or of so much as was necessary to satisfy the judgment. But the effect is pretty much the same as, in the vast majority of cases, when a debtor is driven to the extremity of having his land taken to satisfy a judgment, the profits would not pay the judgment in five years or ten years. This statute did everything that a *Ca Sa* would do to make all a debtor's land liable, and furnished a much more direct, and simple means of making this improved security available, beyond the reach of such contingencies, as under the *Ca Sa* might and generally did defeat the lien.

Chapter 187 provided the remedy by *fi. fa.*, as it was before, and always has been since a *fieri-facias* was authorized to be issued, making it when actually levied (as by the exigency of the writ it must necessarily be before the return day) have the effect of a lien, from the day it went into the hands of the sheriff, upon all goods and chattels within the sheriff's county,—a lien which was effectual against all subsequent executions, *as to the property levied on*, and against all purchasers of it after that day, whether with or without notice. As to all property not levied on before the return day, whether within the county or out of it—the lien was gone, and the execution was *functus officio*. The only material change made in this Chapter, was that of making current money and bank notes liable to levy under a *fi fa*, thus remedying a strange and flagrant defect in the law as it was before the Revision.

It is not known that there has ever been suggested a doubt as to the propriety and wisdom of the changes (Ch. 186 and 187) made in the law, or as to the clearness and precision and proper construction of any section, clause, or word in either of them. They of course, however, are not exempt any more than any other Chapter of the Code from the flippant sneers and random denunciations of those who are in the habit of making a cheap display of their own sagacity by sweeping disparagements of the Code, declaring in terms or in effect, that, in their opinion, it is a confused mass of bungling legislation, that there is nothing certain in it, and that they can't understand anything that is in it. Such opinions might very well be entirely sincere and candid, even although the Code were, what nobody pretends it is, a perfect system of wise legislation, and a model of lucid order, and exact precision of language. The demonstrations of Euclid are none the less clear, beautiful and conclusive, because there are some people who, either from want of industry or some other equally efficient cause, have never been

able to get over the *pons asinorum*, and who without doubt regard these demonstrations as little better than a confused jumble of lines and circles, and a fantastical and nonsensical misuse of the letters of the alphabet.

Those two Chapters, however, left the measures to be substituted for the *Ca Sa*, and the *Elegit* as to personal property, incomplete.

There might be no personal property capable of being levied on in the county where the writ of *fi. fa.* was; or that levied on might be found insufficient to satisfy the creditor's execution. The existence and location of personal property in other counties might be unknown. There might be Equities of Redemption in real or personal property, stocks, bonds, and other choses in action; the debtor might own real and personal estate out of the Commonwealth; property real and personal might be held in trust for the debtor, or fraudulently concealed or conveyed. To get at all these was the object of the *Ca Sa*, a remedy very insufficient, and liable to be defeated in the way already intimated, leaving the *Ca Sa* creditor unsatisfied, and the debtor discharged upon a schedule generally to the effect that the debtor had "no property of any kind, real or personal."

It was obviously proper a substitute should be provided by which the purposes of the *Ca Sa* in these respects should be kept in view, and in which the measures adopted should be, as far as practicable, complete and effectual.

To attain these ends Chapter 188 was prepared by the Revisors. It was prepared, as their reports show, with even more than their usual labor and care, and scrutinized by the Committee of Revision in the Legislature, composed in great part of some of the most experienced and eminent lawyers of the State; and again subjected section by section, line by line, and word by word, to the jealous criticism of the Legislature (in a special session devoted to the examination of the revised bills,) and then passed as it now stands in the Code.

Having already provided effectual and much better remedies than the *Ca Sa* and the old *Elegit* furnished in respect to the real estate of the debtor, it only remained to present similar remedies as to the personal estate. As the *Ca Sa* gave a lien by the act of 1820-21 "on all the property of the goods of the debtor," (the appropriate and exact legal language to describe personal property capable of being levied on under a *fi. fa.*), and, as under the *Elegit* all personal property might be taken, (with the absurd exception of oxen and beasts of the plough;) it was manifestly proper that the new remedy, to be substituted for them, should also give a lien on all such

personal property. As the *Ca Sa* also entitled the creditor, where the debtor swore out of jail, to the benefit of all choses in action and Equities of Redemption, or personal estate not capable of being levied on whether in his possession or held by others for him, either openly or secretly; it was equally obvious, that the new remedy should be made a lien on them.

The most simple and effectual mode of accomplishing all this, was to give to the new remedy precisely the same effect as to all such property, (so far as such effect was proper to be continued,) as if the debtor had been taken under a *Ca Sa*, and sworn out of jail, and made out a schedule containing a full and complete list of all his personal property of every kind such as the *Ca Sa* required him to render, or which might be taken under the *Elegit*. If this were done, it was clear that everything which could possibly be effected by the *Ca Sa*, would be achieved, and it was of no importance by what name the new remedy was called, or whether this new effect were superadded to that of an old remedy, either *Elegit* or *fi. fa.*

It is apparent that the 3d and 4th Sections, Ch. 188, were designed to place and have placed the *fi. fa.* creditor, from the day on which the execution is put into the hands of the sheriff, as to his rights against the property of the creditor, in the same situation, as if the debtor on that day had been taken on a *Ca Sa*, and had sworn out of jail. But as the creditor, by placing his execution in the hands of the sheriff, makes it his duty to levy on specific chattels, if they can be found to the value of his debt, it was just that another *fi. fa.* creditor should have the same right under Chapter 187, as to property not levied on by the first execution; and as the first or any subsequent creditor, in case of failure to get satisfaction under such levy, might not proceed with diligence, either from neglect, or from any other cause of delay, necessary or unnecessary, to enforce the additional lien given by Ch. 188; and assignments might be made to persons paying value for the property, and choses in action, who were ignorant of the execution, or persons owing money to the execution debtor might pay their debts to him in ignorance of the lien of the execution, it was just and necessary that provision should be made to protect such persons from the operation of this new effect given to a previous execution.

These views are plainly and clearly expressed in the law.

The two sections conferring the rights to be preserved in lieu of those which might have been enforced under a *Ca Sa*, are as follows: (p. 717) "Section 3. Every writ of *feri facias* hereafter issued, shall, in addition to the effect which it has under Chapter one hundred and eighty-seven, be a lien from the time that it is delivered to a sheriff or other officer to be exe-

cuted, upon all the personal estate of, or to which the judgment debtor is possessed or entitled (although not levied on, nor capable of being levied on under that Chapter) except in the case of a husband or parent such things as are exempt from distress or levy by the thirty-fourth Section of Chapter forty-nine, and except that as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this Section shall be valid only from the time that he has notice thereof. This Section shall not impair a lien acquired by an execution creditor under Chapter one hundred and eighty-seven."

"Section 4. The lien acquired under the preceding Section shall cease whenever the right of the judgment creditor to levy the *fieri facias*; under which the said lien arises, or to levy a new execution on his judgment, ceases or is suspended by forthcoming bond being given and forfeited, or by a supersedeas or other legal process."

The other Sections of the Chapter (except the 17th, which authorizes the judgment creditor to issue other executions under Chapters 186 and 187) provide merely the means of making the lien given by the 3d and 4th Sections available. These means are substantially the same as those provided before for the discovery and application of an insolvent's property and assets, after swearing out of jail under a *Ca Sa*, improved by being more prompt, simple, and effectual. The 3d and 4th Sections contain the pith and marrow of the new law substituted for the *Ca Sa*, so far as it continued the effect of a *fi. fa.* as a lien, without levy.

It is difficult to understand how there could be any difference of opinion as to the construction of any sentence or word of these two Sections. Yet it is certain that questions have been made as to their construction in several particulars. And it is curious to find that the question in every such case has been, whether the law meant what it has declared in plain, direct, and express terms.

In a controversy between an attaching creditor seeking satisfaction out of a chose in action, in preference to the lien of a previous *fi. fa.* creditor, whose execution had been returned no effects, a Circuit Court decided that the attaching creditor was entitled to preference.

That decision was reviewed in the Court of Appeals, and its decision is reported in 12 *Grattan*, 401, *Puryear v. Taylor*. That Court reversed the decision in conformity with the plain and express language of the law, as well as its manifest intent, both of which were according to natural justice and common equity.

The lien of an attachment is given by statute. The lien of the execution creditor is also given by statute, and in such cases the rule of common sense as well as common justice is that the first *lien* in point of time shall be first satisfied, unless it has been lost by laches, or waived, or abandoned. The decision was exactly the same as it would have been, if a similar controversy had occurred between a *Ca Sa* lien and an attachment *lien*, arising after the debtor had sworn out of jail.

But it is supposed that there is room for doubt whether the new law intended to extend the lien of the *fi. fa.* to property capable of being, but not actually levied on; and the only reasons for this doubt are, that the *fi. fa.* under Ch. 187 was all sufficient for such property, and the new law, Ch. 188, was a substitute for the *Ca Sa*. But the *fi. fa.* existed at the same time the *Ca Sa* did, and yet the only personal property of the debtor on which the *Ca Sa* gave a direct and express lien, was such property as was capable of being levied on under a *fi. fa.* *Choses in action* only became subject to the operation of the *Ca Sa*, when the debtor swore out of jail, and the lien on the personal estate capable of being levied on, though given from the time of the service of the *Ca Sa*, became operative at the same time that the choses in action were made subject to the *Ca Sa* creditor. It would then have been a strange oversight and omission if the new law intended as a substitute for the *Ca Sa* had not extended the lien of the *fi. fa.* to the same personal estate as the *Ca Sa* gave an express lien upon and confined it to property on which no express lien was given by the *Ca Sa* law.

There was just the same necessity and propriety for giving a *lien*, under the new law as under the old, on all the personal property of the debtor, whether capable of being levied on or not. The framers of the law certainly thought so, for they have so declared in express terms—so clear as not to admit of well-grounded doubt.

The lien of the *fieri facias* was limited in its effects under Ch. 187 to *personal property* levied on before the return day. Chapter 188 provides "that in addition to that effect, it shall be a lien on *all* the personal estate of the debtor." It is not a new *lien* created only for the purpose of reaching other and different property than such as might have been taken under the lien, provided it were taken before the return day. But it enlarges the effect of the lien given by Ch. 187—so as to extend to, and cover *all* the personal property not actually levied on under that chapter: and to prevent any possible misconstruction the law provides that this extended lien shall apply to "all personal estate of or to which the debtor is *possessed* or entitled," (al-

though not levied on nor capable of being levied on under chapter 187.") Why refer to property *not levied on* under chapter 187—if the extended lien was to apply only to property *not capable of being levied on*. If such had been the intention, the law would have said "shall be a lien on all the personal estate not capable of being levied on under chapter 187." Then it would have been just as clear, that the effect of the lien under chapter 188 did not apply to property, the lien on which could only be perfected by actual levy, as it is now that it applies to all personal property whether capable of being levied on or not.

This was doubtless the opinion of the Court of Appeals in *Puryear vs. Taylor*, though it may be, that it never occurred to the judges, that it was possible to suppose the law did not apply to personal property of one description as well as of another. Such undoubtedly is the generally understood meaning of the decision of the Court in that case. And it is supposed to be generally conceded, by the profession at least, to be a sound exposition of the law, and that the law so understood is just and wise.

The judges of that court, however, certainly will be very much surprised to learn that a circuit court has decided upon the authority of *Puryear vs. Taylor*, not only that the lien of a *fieri facias* continues after the return day (which certainly was decided) and continues upon *goods and chattels* not levied on (which if they have not decided, they certainly will decide)—but *furthermore that such goods not levied on did not become subject to a subsequent execution*. The Court of Appeals have made no such decision, and it is supposed never will make it while the law remains as the Code made it. If any circuit court has made such a decision, it has obviously misunderstood the case of *Puryear vs. Taylor*, which raised no such question—and has still more flagrantly misconstrued the express language of the law.

The very section which extends the lien so as to continue after the return day and without a levy, declares that this section "*shall not impair a lien acquired by an execution creditor under chapter 187.*" It is difficult to believe that a judge of a circuit court can have decided that a law has an effect, which the law in terms says it shall not have, that a lien given without a levy, shall be construed to destroy and defeat a lien perfected by levy, which the law itself says shall not be even impaired by it.

If such a decision has been made, it shows not that there is any defect in the law, but a defect in the administration of the law, which might well cause alarm and dismay, but for the assured certainty, that it will be promptly reversed by the Court of

Appeals, whenever the question is submitted to it. Such cause of alarm might well have existed under the law of lien under a *Ca Sa*, for a subsequent levy on goods and chattels belonging to a debtor when he was arrested, or at the time he swore out would have been defeated by the lien of the *Ca Sa*. In that respect the present law is less beneficial to the execution creditor than the *Ca Sa* and also in another particular about to be noticed.

It is said the alarm above referred to is well founded, because no *purchaser* any more than an execution creditor could or would ever be safe—that after such a lien as Ch. 188, gives—a general, continuing, indefinite lien—after a sale to an *innocent* purchaser—the plaintiff might step forward and enforce his lien. That the property may have changed hands a dozen times during as many years; yet this dormant lien may spring into active operation at any moment!! Such consequences may well be characterised as consistent neither with good sense nor justice; and yet there are still found some, who, while they denounce the law, which is *erroneously* supposed to sanction them, are yet clamorous for the revival of the *Ca Sa* law, under which such things might have happened, and who yet continue to mourn over the destruction of the beneficent institution of imprisonment for debt.

But it is all a false clamor. The framers of the present Code, while they preserved everything in the *Ca Sa* law, which was valuable and just, and have, it is believed, improved very greatly the remedies of execution creditors by their substitute for it—saw that not only as to subsequent creditors, who levied their executions on *goods* and *chattels* of their debtor, but also as to innocent assignees for value either of such goods, or of choses in action—it was not wise or just, and it ought not to be law—that they should be defeated by a dormant and unknown lien either under a *Ca Sa*, or any remedy substituted for it.

Chapter 188 therefore in addition to the provision for the protection of subsequent execution creditors in the Proviso already referred to, also provided that the lien created by section 3rd, "as against an assignee of any such estate for valuable consideration, or a person making a payment to the judgment debtor—the lien by virtue of this section shall be valid only from the time that he has notice thereof." Thus again expressly guarding against the very mischief it is complained of as sanctioning.

It probably never entered into the imagination of anybody connected with the revision, to suppose that purchasers of goods and chattels were not included in the words "assignees for valuable consideration," or that there could be any doubt, that

although there might be *assignees*, who were not *purchasers*, yet that it was a legal impossibility that there could be a *purchaser for value*, whether of lands, goods, and chattels, or choses in action who was not in legal contemplation and according to the well understood signification of legal language *an assignee for valuable consideration*. It is true that the technical name of the instrument transferring a chose in action is an "assignment," and that conveying land or goods and chattels, a "grant" or "conveyance;" but the transferee for value, under each, is both purchaser and assignee either in law or equity. If the framers of the law had intended to discriminate between purchasers, or assignees of goods and chattels, and purchasers or assignees of choses in action—they would probably have known how to do it. As they knew, that a purchaser of any kind of property was exactly the same thing as an assignee for value of such property, it was natural that they should use those terms indifferently.

There is not the least foundation then for the apprehension that, by reason of the continuing indefinite nature of the lien given by § 3 of Ch. 188, subsequent execution creditors or innocent purchasers for value can be injured; *they are expressly protected*.

As to the doubt whether the *fi. fa.* lien given by Ch. 189, was to continue after the return day, it can arise only from disregarding the plain, express and concise language of § 4, which declares when the lien shall cease. It shall cease, when the right to enforce any execution on the same judgment shall cease by reason "of a forfeited forthcoming bond, or by a superseas, or other legal processes." And yet the doubt is whether it does not cease at some other time or by some other means, than those expressly declared by the law. To have made the effect of the lien given by that chapter cease on the return day of the execution, would have made the law merely absurd and ridiculous.

Chapter 188 of the Code has been three times before the legislature for amendment. Twice (Session acts 1851-2, p. 36, Ch. 49, and 1852 p. 76, Ch. 91,) amendments were made with a view to increase and strengthen the means provided in § 5, for enforcing the lien given by § 3, and once (1850-1, p. 34, § 16,) to make amendments to correct supposed verbal inaccuracies in § 9 and § 15.

At the last, or some less recent session of the Assembly, a resolution of enquiry was referred to the judiciary committee, founded, it is believed on grounds of objection to the law such as have been discussed in this article, and after consideration the committee declined to report any bill and reported against any change of the law. When it is shown that the law is really

unwise and defective, it will doubtless be changed—but the legislature will hardly be influenced by false clamors founded on palpable misconstruction of the law as it is ; and especially not to pass a new statute declaring that the law in the Code means, what the law itself in the Code says it means in language “concise, plain, and intelligible.” *

LIEN OF THE FIERI FACIAS.

The Review of *Puryear vs. Taylor*, (Oct. No. Law Journal) reviewed.

We have received the following communication on the subject of the decision in *Puryear v. Taylor* ; and although we have already in, a lengthy review of the question of the lien of the *fi. fa.*, we publish it as presenting a somewhat different argument, although arriving at the same conclusion. The subject is one of so much import to the profession and to the State at large, that it cannot be discussed too broadly.—ED.

The arguments in the review alluded to are characterised by very considerable ingenuity ; but, nevertheless, they do not appear to establish the position, that the lien of the *fi. fa.* given by sec. 3 of ch. 188 of the Code extends only to choses in action, or subjects not capable of being levied on, and that consequently a lien on no other subjects is prolonged by the operation of sec. 4.

The language of the 3rd sec. of ch. 188 is, that “every writ of *feri facias* hereafter issued, shall, in addition to the effect it has under ch. 187, be a lien, from the time it is delivered to the sheriff to be executed, upon all the personal estate of, or to which the judgment debtor is *possessed* or entitled, (although not levied on, nor capable of being levied on under that chapter) except in the case of a husband or parent such things as are exempt from distress or levy by the 34th sec. of ch. 49.” Section 4th says, “the lien *acquired under the preceding section* shall cease whenever the right of the judgment creditor to levy the *fi. fa.* under which the lien arises, or to levy a new execution on his judgment ceases,” &c ; hence, to ascertain what liens are prolonged by sec. 4, it must be ascertained what liens are *acquired* by sec. 3.

An attentive examination of the language of sec. 3 will be sufficient, in our humble opinion, to shew that a lien is thereby given upon *all* the personal estate of the debtor. If this were not so, for what purpose were the words, “which the judgment

debtor is possessed," and the words, "although not levied on," introduced? These forms of expression point to subjects capable of being levied on, and would be wholly inappropriate to anything else. This section, therefore, certainly must declare a lien upon subjects in *possession* as well as in *action*; upon subjects capable of being levied on, as well as those *not* susceptible of a levy. This view seems to be further sustained by the exception in favour of a husband or parent. Those articles are things capable of being levied on. Why make the exception in this section? Certainly for no other reason than that the section would otherwise embrace them, and that a lien would be created upon them if not excepted.

When the legislature said, that the *fi. fa.*, in addition to the "effect" it has under ch. 187, shall be a lien on *all* the personal estate of the debtor, it should not be understood to mean, that ch. 187 gave a lien upon all subjects capable of being levied on, and that ch. 188 was only intended to create a lien upon the *remainder* of the debtor's personal estate; for that was but a form of expression adopted to create a *statutory* lien upon the entire personal estate. It does not say that, "in addition to the *lien* acquired under ch. 187 the *fi. fa.* shall be a lien on all the *balance* of the debtor's personal estate;" but it says, in addition to the "effect," (that is any effect) which it has under that chapter it shall be a lien upon *all* the personal estate. Strictly, there is no lien given by ch. 187. The common law gives the lien under that chapter, and the statute gives it under ch. 188, *for the purpose* of prolonging it by sec. 4.

In respect to subjects capable of being levied on, the legislature intended the *fi. fa.* to bind from the time the sheriff received it even against purchasers for value without notice, and creditors. In this it abridged the common law lien, which bound from the *teste* of the writ. As to other subjects, of a more commercial nature, it intended it should *not* bind against an assignee for value without notice. The first is provided for in ch. 187, sec. 11. The last by ch. 188, sec. 3; and the words "any such estate" in the last named section, apply only to so much of a debtor's estate as to which the term "assignee" is appropriate. It by no means follows that this saving is obliged to have a reference *coextensive* with the liens given by sec. 3. The concluding words of sec. 3, seem to have been intended to prevent the application of the saving in favor of assignees to the subjects as to which there is a saving in ch. 187, sec. 11. Ch. 187 gives the *fi. fa.*, and in some sense may be regarded as thereby giving the common law lien—hence it might be said, that the lien acquired under ch. 187 should not be impaired by ch. 188—thereby meaning, that the savings in favor of purcha-

sers for value without notice, and creditors, in the one case, and in favor of assignees and persons making payments in the other, should not be confounded, but each saving should apply to its appropriated class of subjects.

As clear as the intention of the legislature seems to have been to extend the lien of the *fi. fa.* beyond the return day of the process in regard to all kinds of personal estate, yet the reasons for so doing, are still stronger.

The temper of the times demanded the abolition of imprisonment for debt: It became the duty of the legislature when it abolished the *ca. sa.*, to supply a substitute which, in point of efficiency should approximate as nearly to the *ca. sa.* as possible. The substitute would have fallen far short of that effect if it had stopped with choses in action, or things not capable of being levied on. The *ca. sa.* made no such distinction, but bound every thing from the time it was executed. Under the old system the *fi. fa.* was in many instances wholly inadequate, and the *ca. sa.* had to be resorted to, to get the benefit of things *capable of being levied on.* A debtor might place his property beyond the reach of the *fi. fa.*—he might secrete it, or send it beyond the jurisdiction of the officer—when the *ca. sa.* was the only means of fixing a lien. Give to the *fi. fa.* no continuing lien beyond the return day *quoad* subjects capable of being levied on, and the debtor may choose whom he will pay. Diligence will be nothing, and may always be beaten in the race by cunning. A debtor may send his slave or horse out of the county, and a junior creditor may get to the bailiwick to which it has gone first with his *fi. fa.*

In addition to the full power the debtor would have, in many instances, to foil the levy of a *fi. fa.* before the return day, and thereby give preference to a younger and more favored creditor, questions would arise at every turn, whether the lien continued or not?—whether the subject was capable of being levied on or not? A debtor is driven to a law suit to recover his slave in the adverse possession of another. If he brings *trover*, the claim is but a chose in action, and so continues to be. If he brings *detinue*, and chooses to take a distringas upon the record, and the property can be had, it is property in possession capable of being levied on. If he chooses to take the alternative value, it is but a chose in action. The return day of a *fi. fa.* against the plaintiff has just expired, and he takes a distringas that his property may not be bound—so that it would depend upon the will of the debtor whether a lien should continue or not. A person may be a legatee under a will to which he is executor. It would frequently be very difficult to determine when the possession as executor ceased, and when that as legatee commenced;

consequently, when the legacy ceased to be a chose in action and became property in possession capable of being levied on. The evils which would spring from having questions of this character continually arising would greatly overbalance any which could arise from dormant liens. The clerk's office will inform a purchaser of the state of the liens, and a younger creditor has ample means to compel a prior one to enforce his lien where he holds it as a shield to his debtor's property. The *ca. sa.* also created a dormant lien, and it slept on as long as the debtor chose to remain in jail or in the prison bounds. The present lien is no worse.

W. H.

ASSUMPSIT.—PLEADING.—VARIANCE.

J. A. Stigler & Co. vs. Dyer, Paulett & Co.

At a Special Term of the Circuit Court of Wythe Co., Va., held in November, 1857.

When a special contract has been performed on one side, so as to leave nothing but a single debt or duty on the other side, compensation may be recovered in a general action of *assumpsit*.

Goods were sold on a credit of three years; the purchaser to give approved security: the goods were delivered, but the purchasers failed to give the security when called on: the price of the goods may be recovered in general *indebitatus assumpsit*, although the period of credit has not expired.

There were several questions in this case, but the only one of importance was in regard to an alleged variance between the declaration and the proof.

It was an action of *assumpsit* to recover the price of a large bill of goods alleged to have been sold by the plaintiffs to the defendants. There were three counts in the declaration.

First, The ordinary general *indebitatus* count for goods, wares and merchandize, sold and delivered.

Second, The ordinary *quantum valebant* count.

Third, The ordinary count on an *account stated*.

No special circumstances were stated in any count; and all purported to be founded upon claims now due. Plea *non assumpsit*.

Brown and Johnson for plaintiffs.

Cook for defendants.

A jury was waived and the whole case submitted to the court. From the testimony the following facts appeared. The firm of the defendants consisted of four persons—*Dyer, Paulett, Noel, Bevill*. On the 17th November, 1856, Mr. Dyer purchased from the plaintiffs, in Lynchburg, a quantity of ready-made clothing, amounting to upwards of \$2,400. The purchase was made for the firm and on its credit, but without the knowledge of *Noel*, or *Bevill*, but with the sanction of *Paulett*. The terms of the contract were that the purchasers were to take the goods at cost: that they were to pay interest from the day of sale: were to have a credit of *three years*; and were to execute notes for the price and interest, with such security as should be approved of by Mr. *Wm. Gibboney*. The goods were sent at once to the depot, and forwarded to the defendant's store in Wytheville. As soon as *Noel* and *Bevill* were informed of the purchase, they refused to sanction it. At the time of the purchase, *Dyer* and *Paulett* were trying to buy out their partners; but that negotiation was never completed. The goods remained unopened until the 27 January 1857, when the firm was dissolved, and their whole stock sold to *R. M. Taliaferro*. The goods purchased from the plaintiffs were also sold to *Taliaferro*; but a separate account was kept of them. For those goods Mr. *Taliaferro* executed three notes, payable to *Dyer* and *Paulett*, and due at two, three, and four years, with interest after one year. Soon afterwards Mr. *Gibboney* applied to the defendants for notes, with security, agreeable to the contract with the plaintiffs. They offered him *Taliaferro's* notes, to be endorsed by *Dyer* and *Paulett*. He refused to accept them with that endorsement; but offered to receive them if endorsed by all the defendants. To this proposition the defendants would not accede. Nothing further was done till the institution of this suit. Mr. *Gibboney* stated that he considered Mr. *Taliaferro* entirely good for the debt; but as the debt was a large one, and the credits long, he, acting for other persons, did not wish to run any risk; and therefore declined to accept the paper unless all the defendants were responsible.

Cook insisted, on this evidence, that the plaintiffs must be non-suited, or judgment go against them, on the ground of a total variance between the contract alleged, and the one in proof. He contended that the defendants had substantially, at least, complied with the special agreement on their part; for they had tendered the obligations of a person, admitted to be good, for the amount. He relied on the following authorities: *Broomfield vs. Smith*, 1 Meeson and Welsby 542; *Webb vs. Fairmaner*, 3rd Idem, 473; *Price vs. Nixon*, 1 Eng. Com. Law Rep. 126; *Dutton vs. Solomonson*, 3rd Bos. and Pul. 582;

1st Greenleaf, Evid. 74; *Tote vs. Wellings*, 3 Term Rep. 531; *Littler vs. Holland*, Idem 590.

This view was controverted on the other side, and the plaintiff's counsel insisted that as the defendants had not performed the condition they were not entitled to the credit: that nothing special now remained; but that the defendants simply owed a debt, and that such debt could be recovered without any special count. The authorities in support of this view are mentioned in the opinion of the court.

HUDSON, J. (sitting for Judge *Fulton*.)

I have held up this case during last night to look into the authorities. The only question is, whether there is such a variance between the proofs and the allegations as will preclude a judgment for the plaintiffs: or rather, whether the special agreement is in force at this time. If it be so, the plaintiffs must be non-suited; for they do not mention this special agreement in their declaration; and if it be yet in force, they, of course, cannot recover on the general counts. But I do not think it is in force. I do not think the defendants can rely upon the special agreement, after they have themselves failed to comply with it. Of course I hold that the tender of the notes of a third person, however good, endorsed only by a part of the defendants, was no performance of the special agreement. When a contract, however special in its terms, has been performed on one side, leaving only a plain duty to be performed, or a plain debt to be paid on the other, that special contract is at an end. Here the plaintiffs did all that was incumbent on them, and the defendants have failed in that which would have entitled them to resist on the special agreement. I think these views are sustained by the authorities collated in the notes to pages 95 and 96 of 2nd Starkie on Evidence. I shall, therefore, render judgment for the plaintiffs for the debt and interest.

EJECTMENT.—POSSESSION.

Adams and another v. Pedigo and others.

Circuit Court of Floyd County, Va., Sept. Term, 1857.

A party in peaceable possession of land, to which there is an older outstanding title, is turned out of possession by persons not connected with the older title; in ejectment, he may recover upon his possession merely, and the outstanding title will not protect the intruders.

Actual peaceable possession is good against any one who cannot show a good title and right of entry.

This suit was originally brought in *Patrick* county; but Judge GILMER having been counsel in the cause, it was sent to *Floyd* for trial. It was an action of ejectment for 400 acres of land, on Smith's River, in Patrick. Issue was made up in the manner directed by the Code.

Staples & Cook for the plaintiffs.

Wysor, Lane & Phlegar for the defendants.

The plaintiffs read a patent, dated on the 30th January, 1846, for 400 acres of land, granted to the plaintiff, *N. P. Adams*; and they proved that said patent covered the land in controversy. They then introduced a witness, *Terry*, who stated that for many years prior to 1841, his father owned land adjoining this 400 acre tract; that his father cleared a small part of the 400 acres, believing it to be vacant land, or that no owner could be found for it; that the part so cleared adjoined his father's own land; that his father occasionally cultivated the part so cleared, and after his death witness cultivated this clearing for some years; that neither his father nor himself ever set up claim to the land, nor did they know to whom it belonged, though he had heard it called "Ward and Callaway's land," but knew nothing of their title; that in 1841 the plaintiff, *Adams*, claimed the land, and required the witness to surrender possession to him; that witness agreed to pay *Adams* rent for the land cleared, and to hold it as his tenant; that he was not informed of the grounds of title set up by *Adams*, but believed that he claimed it on the ground that he had located a land warrant on it as vacant land; that witness held possession, as the tenant of *Adams*, until March, 1846, and paid *Adams* rent; that in November, 1844, *Adams* leased another part of the land to a man named *Wood*; that a written lease was made between *Adams* and *Wood*; that *Wood* built a cabin and did other work on the land; that *Wood* was to hold the land two years, and was to pay his rent in work; that, according to the best of his recollection, *Wood* left the land in the year 1845, though he made *two crops* on the land; and in that case he must have remained till 1846. The lease was produced, dated in *November*, 1844. It provided that *Wood* was to have the privilege of making *two crops* on the land; and his rent was to be paid by the performance of certain work, and by giving *Adams* a part of the crops.

Wood's deposition was taken, and he stated that he went

into possession of the land "about the year 1845," as tenant to *Adams*, under the lease aforesaid; that he made two crops on the land, and in the "next spring" the defendants, *Pedigo* & *Harber*, came to his house with axes in their hands, and demanded possession, and threatened "to move in upon him;" that, being alarmed by this, he moved out of the house and off the land, and these two defendants moved into the house. According to his statement, this must have happened in the spring of the year 1847.

The *defendants* read in evidence a patent issued in the year 1783, granting 1100 acres of land to *John Ward* and *John Callaway*; and they proved that this patent embraced the 400 acres covered by the patent to *Adams* in 1846. They also read two deeds from *Richard Harber*, dated in March, 1847; one conveying certain land to the defendant, *Pedigo*; the other conveying another and adjoining parcel to the defendant, *J. W. Harber*; and they proved that these two deeds covered all the land embraced in the patent to *Adams*. But they wholly failed to show any connection between these deeds and the patent to *Ward* and *Callaway*; and admitting this, they relied on that patent as evidence of a title, older and better than that of *Adams*, outstanding in third parties, and defeating the grant to *Adams*. They also introduced evidence tending, as they alleged, to show that they took possession of the land in 1845, prior to the grant to *Adams*; that *Wood* had left the land sooner than the time he had stated; and that *they* were in possession of the land when the patent issued to *Adams*.

After the evidence was concluded, each party moved for a set of instructions, embodying his views; but it is not necessary to set them out, as the court gave neither in the form asked for, but prepared an instruction, to which neither side excepted. The plaintiffs contended, that if they had shown themselves to be in the *peaceable possession* of the premises before the entry of the defendants, then such entry was unlawful, whether the plaintiffs had good title or not, and the defendants could only enter by force of a *good title in themselves*; that the plaintiff in such case was entitled to recover merely upon his possession; and the defendants could not defeat such recovery by showing an older and better outstanding title, unless they connected themselves with that title; and they relied on *Cobbs v. Tapscott*, 11 Grat. 172, and the authorities therein quoted. They contended for the distinction between *actual* and *constructive seisin*, as against the outstanding title; and referred to the opinion of Judge ALLEN, in *Dawson v. Watkins*, 2 Rob. Va. Rep., 259, to show that the outstanding title was only allowed to defeat *constructive seisin*. The

defendants contended for a modification of this doctrine, to the effect that if the *defendants were in possession when the plaintiff's patent issued*, then such patent conveyed no title, but was defeated by the outstanding title, and the defendants were entitled to the verdict.

FULTON, J.

Seisin is of two kinds,—one constructive, the other actual. The former is, when the party claiming the land relies only upon his title, without having ever been in actual possession, and he must show that his title is such as to give him constructive *seisin*, and of course his title will not do this if there be an older and better title, of the same kind, in another person, whether that person be the defendant or a stranger; and when the plaintiff relies only on such constructive *seisin*, the older outstanding title is an insurmountable barrier to his recovery of the land by action of ejectment. But I consider it to be wholly different in the case of *actual seisin*—of a *pedis positio* on the part of him who sets up claim to the land. Where a party has been ejected from land by one who has title, there the courts will go into an enquiry as to the comparative value of their rights; but not so with a mere trespasser. He finds the other party in peaceable possession, and deprives him of that possession without being able to show any right on his own side; and then the rule is, that such possession shall be restored to the party ejected, whether he held by good title or not. The policy of this rule is to render peaceable possession a good title against all the world except him who can show good title.

I do not think I can undertake to limit the plaintiff's right, arising from possession, to the date of his patent. The rule does not require a *good title* in the plaintiff; indeed it goes on the concession that his title is unsound—for if he had a good right, then such a rule would be useless. If a party is in peaceable possession of land he has the right to retain it, and also recover it against a wrongdoer, whether the title be in a stranger to the suit, or in the Commonwealth.

Not feeling exactly satisfied with either instruction, I have modified, and to some extent combined them, and shall give them in the following form:

“If the jury believe that, on the 30th day of January, 1846, the date of plaintiff's patent, the defendants, or either or any of them, were in the actual peaceable occupation of the premises in controversy, and shall also believe that said premises are included in the patent to Ward and Callaway, issued in the year 1783, then the plaintiff's patent conferred no title on

him, and the older patent is an effectual impediment to his recovery in this action; *but*, if the jury believe, from the evidence, that the defendants acquired possession of the land, by turning the plaintiff or his tenants out of possession, then a possession so acquired will not avail the defendants, the older patent will not aid nor protect them, and the jury ought to find for the plaintiffs."

No exception to this instruction.

There was verdict *for the plaintiff, Adams*. The defendants moved for a new trial, but the motion was overruled, and the defendants did not except.

PLEA IN ABATEMENT.

Crockett v. Keller.

At a Special Term of the Circuit Court of Wythe County, Va., held in November, 1857.

Every plea *in abatement* must give the plaintiff a better writ.

Where the defendant pleads that he is not a resident of the county in which the suit is brought, the plea must set out his residence, otherwise it is bad on demurrer.

A plea *in abatement* being held bad on demurrer, the court will not permit it to be amended.

This was an action on the case, brought in the County Court of Wythe, by *S. S. Crockett* against *C. F. Keller*. The process was returnable to the September Rules, 1857, when the defendant appeared, and filed the following plea *in abatement*:

"And the said defendant says that, at the time of the institution of this suit, he was not, and now is not, an inhabitant of Wythe county aforesaid, nor a resident within the jurisdiction of this court; nor did the causes of action in the plaintiff's declaration mentioned, or any of them, accrue and arise to the plaintiff within the county aforesaid, or within the jurisdiction aforesaid, and this he is ready to verify—wherefore," &c.

To this plea the plaintiff demurred; and by consent the cause was removed to the Circuit Court; and the demurrer was called up for argument on the 16th November, 1857, at a special term of the court, held by Judge HUDSON, sitting for Judge FULTON, and at his request.

Cook for the plaintiff.

Terry for the defendant.

The ground of the demurrer was, that the plea did not set forth the defendant's actual residence, and so did not give the plaintiff a *better writ*; and *Mr. Cook* referred to *Middleton v. Pinnell*, 2 Grat. 202, and *Horton &c. v. Townes*, 6 Leigh. 47.

Mr. Terry admitted that under these authorities the plea could not be sustained in its present shape. The demurrer was therefore sustained, and then *Mr. Terry* asked leave to amend the plea. He stated that the defendant was a resident of *Washington* county; and said he would, by leave of the court, insert that fact in the plea. The court took time till next day to consider the question; on which day, (Nov. 17.)

HUDSON, J., said—

Pleas in abatement are not very frequent in our practise, and are discouraged, as well by statute as by the courts. In this case the plea has been held bad, and the propriety of the decision is not questioned. But a new question was raised by *Mr. Terry's* application for leave to amend the plea. I have never known such an application, and I desired time to reflect upon it. I have looked into all the books which I thought would throw any light upon the question, and I have been assisted by counsel; yet I can find nothing bearing directly upon the question.

In all the books I find this proposition to be maintained: that the courts will not allow two pleas in abatement, *of the same character*, to be filed. There are several classes of pleas in abatement. Having filed a plea belonging to any one of these classes, and that having been held bad, another of the same class will not be received. I find this doctrine in *Tucker's Com.* 2, page 248, and also in the case of *Ross v. Cooke*, decided in the Colonial General Court in 1836, and cited at page 136 of the first volume of the first edition of *Robinson's Practise*. Judge TUCKER gives the very instance of a plea to the jurisdiction as in this case, by way of illustration of the proposition that two similar pleas cannot be received.

I think an *amended plea* is a *new plea*. It is based upon new facts, not before stated. It therefore falls within the rule above stated, and I think is not admissible. I therefore cannot admit an amendment of this plea; and the defendant must *answer further*.

The defendant then demurred to the declaration, and pleaded *non assumpsit*.

CONTRACT.—MODIFICATION BY PAROL.

Cock v. Chambers.

Circuit Court of Carroll County, Va. August Term, 1857.

A parol agreement will not be allowed to contradict or modify a written contract, but evidence of a parol agreement in *discharge* of a written contract is admissible.

Case shewing the difference between the parol *modification* and the parol *discharge* of a written obligation.

Quære :—Whether an agreement between an administrator and a legatee, that the latter shall accept debts upon other persons, which the administrator undertakes to collect, in payment of his legacy, be not against public policy.

Thomas Chambers brought an action of debt against *John Cock, Sr.*, in the Circuit Court of Carroll county, upon the following obligation :

“ I promise to pay *Thomas Chambers* eleven hundred dollars, on settlement, for his interest in the estate of *Tobias Philips*, deceased, it being the legacy of *Thomas Philips* and *Robert Philips* in the estate of the said *Tobias Philips*, dec'd, as soon as it can be collected, with interest from this day till paid. Given under my hand and seal, October 24th, 1842.

The above is only in the estate where I am administrator *de bonis non*, with the will annexed, of *Tobias Philips*, deceased.”

JOHN COCK, SR., [*Seal.*]

No defence being made at law, an office judgment was confirmed, at March term, 1856, for \$1,100, with interest from October 24th, 1842; and costs, subject to some credits, amounting to upwards of \$700. Thereupon, *Cock* applied for and obtained an injunction to the judgment.

The bill alleged that, many years ago complainant was the administrator *de bonis non*, with the will annexed, of *Tobias Philips*, deceased; that in October, 1842, *Thomas Chambers*, a resident of *Tennessee*, came to Carroll county, claiming the interests of two of the legatees of *Philips*; that a settlement was made between him and complainant, on which *Chambers*, as representative of those two legatees, was found entitled to \$1,100; that in part satisfaction of that claim *Chambers* agreed to take certain bonds which complainant held on various persons, amounting in the whole to \$898 64 cents, a list of

which; marked (A.), dated on the 24th Oct'r, 1842, was exhibited with the bill; that as all those claims were considered to be good debts, *Chambers* agreed to take them at his own risk, without recourse on complainant—at their nominal value—interest deducted; that complainant agreed to collect those debts and pay them over to *Chambers*; that at the same time complainant executed the bond, on which judgment was rendered as aforesaid; that among said bonds was one on a certain *Dennison Baldwin*, then a merchant at *Christiansburg*, who was reputed to be perfectly solvent, for \$320 45 cents; that, to the surprise of complainant, *Baldwin* soon afterwards applied for and obtained the benefit of the bankrupt law, and no part of the debt upon him was ever made; that complainant had collected and paid over to *Chambers* the amount of the other debts, and had altogether paid him nearly \$800; that *Chambers*, in disregard of their agreement, had refused to give him credit for the note on *Baldwin*, and had sued him upon the bond and recovered judgment for the balance. The prayer was, that he might have credit for the debt on *Baldwin* and its interest.

The exhibit (A.) filed with the bill was wholly in the handwriting of complainant. It purported to be a list of bonds, (that on *Baldwin* being the first,) amounting to \$898 64, and to it was prefixed this caption: "Memorandum of bonds, trust deeds, &c., to collect for *Thomas Chambers*, which *John Cock, Sr.*, has to collect; which said *Cock* has given, his note for to said *Chambers*, dated the 24th day of October, 1842, which note is for eleven hundred dollars." Then followed the list of notes, &c. This paper was not signed by any one, though *there were two attesting witnesses.*

Chambers, in his answer, flatly denied almost every allegation of the bill. He averred that the bond on which he had brought suit contained the whole contract and agreement between himself and *Cock*, and that there had never been any modification of the contract, or any agreement to take any notes or claims in payment; that he was, at the time the bond was executed, and now is, a resident of Tennessee, living hundreds of miles from Carroll county, and a stranger in Virginia, knowing nothing of *Dennison Baldwin* or any one else named in the list filed with the bill; that he should consider himself open to a charge of silliness if he had given up his claim upon a solvent estate and a responsible executor, and converted it into demands upon persons of whose standing he was utterly ignorant, and who were scattered all over the country; that he had never seen nor heard of the list or memorandum, exhibit (A.), which, as could be seen, had

never been executed by himself or any one else; that all his debt was justly due, except the amount credited upon the bond, and that the whole story set out in the bill was a groundless fabrication. He further called for proof of *Baldwin's* bankruptcy, and that complainant had taken proper steps to prove the claim against his estate, if those facts should be held material in the cause, which he did not admit as to him; and he also stated, that he did not admit plaintiff's right, in this or any other court, to attempt to set up a parol agreement against his own sealed obligation.

The only evidence taken in the cause consisted of the depositions of the two witnesses to the *memorandum* exhibit (A.) One swore that he was present at the settlement made on the 24th October, 1842, and that *Chambers* agreed to take the note on *Baldwin*, at his own risk, but he did not state in payment of *what debt* it was taken, though he said that *Cock* then executed the \$1,100 bond to *Chambers*. The other stated that he was also at the settlement, and that "*Chambers* was to take the note on *Baldwin* at his own risk, in payment of a debt which *Cock* was to pay to *Chambers*, and that *Cock* told *Chambers* it was doubtful about collecting that note."

The note on *Baldwin* was filed on the trial. It was for \$320 45, dated on the 2d May, 1842, due in six months, and payable to *Cock*.

The defendant excepted to the depositions, on the ground that they tended to set up a parol agreement in contradiction of the plaintiff's obligation in writing and under seal.

The cause came on at this term upon a motion to dissolve the injunction, and the exceptions to the testimony were argued in connection with the general merits of the case.

Cook, for the defendant, in support of the motion and exceptions.

No proposition is clearer, than, that a written instrument cannot be contradicted, altered or defeated by parol testimony. It is hardly necessary to cite authority for a proposition, so elementary in its character; but I refer to 1st Phillips on Evidence, 548; *Howes v. Barker*, 3d Johnson's Reports, 498; *Parsons on Contracts*, vol. 2, page 59. The rule is the same in equity as at law. *Gresley's Equity Evidence*, p. 3 and 277; *Parkhurst v. Van Constlandt*, 1st Johnson's Chan. Rep., 273; *Moran v. Hays*, Idem 339; *Ratcliffe v. Allison*, 3d Rand., 537. These authorities show, not only that the evidence is inadmissible, but that the theory of the bill itself is untenable. It is an effort to interpolate into a written contract a term not therein expressed, to wit: that the bond was payable in part, in debts on other individuals. This would destroy the

obligatory effect of a written agreement. This evidence in itself shows the necessity and importance of excluding parol testimony; for here, after the lapse of nearly *fifteen years*, the witnesses not only swear to the fact of the parol agreement but to the *date* and *amount* of a note for money. It is marvelous, to say the least.

The bill is inconsistent, contradictory to itself—we may say incredible. Complainant alleges that he owed a debt of \$1,100; that he paid, and defendant agreed to receive, and did receive, \$898 in the bonds of other persons, and yet at the same moment complainant executed his bond for the *full amount*. One would suppose he would give his note for the *balance* only; or that he would have had the sum paid credited upon his bond. The story overtasks our powers of credence.

It is submitted, that such an agreement as that set up in the bill is contrary to *public policy*. Contracts between fiduciaries and those for whom they are to act, are always regarded with jealous eyes. *Waller v. Armstead*, 2d Leigh 11; *Hugerinin v. Baseley*, White and Tudor's Leading Cases in Equity, vol. 2, p. 406; 1st Story's Equity Jurisprudence, sec. 308, *et seq.* This doctrine is also referred to and recognized by our court, in the recent case of *Gribbins v. Markwood*, 13 Grat., 495. These principles are considered applicable to this case. Complainant was executor of a solvent estate, and was liable for a definite amount of it, as is shown by the execution of his personal obligation for a fixed sum. He had either received and appropriated to his own use the assets of the estate, or knew that he could lay his hands upon them. He does not pretend that there was any deficiency of assets, or ask any deduction. *He has our money in his pocket*; and to avoid payment sets up a parol agreement of the beneficiary to take payment in paper which has proved worthless; and that, an agreement alleged to have been made by a beneficiary, living hundreds of miles off, and a total stranger to the obligors in those substituted bonds. We submit that the transaction is one which neither law nor equity will sustain. If it deserves any countenance at all, the court will hold the executor to proof of *uberrima fides*. He alleges that the bonds were considered good, and were taken without recourse; a fact disproved by one of his own witnesses; but which, even if it were true, the court could only regard as an improvident agreement on the part of the legatee, which ought not to be enforced.

As between these parties, the alleged agreement to take *Baldwin's bond without recourse*, is void for want of consid-

eration, *Chambers* had a valid, subsisting, valuable claim upon a good estate and a responsible executor: to waive that right and agree to take the debts of unknown parties, was *nudum pactum*, and the court will not enforce it.

There is no evidence of *Baldwin's* bankruptcy, nor of any attempt of complainant to realize anything by proving against his estate, while he admits that it was his duty to collect the debts.

McCamant for the plaintiff. *Chambers* was to receive the interest then due upon the bonds transferred, so that there is a consideration, and his agreement was not *nudum pactum*.

Chambers was a man of mature age, fully capable of protecting his own interests. He had ample opportunities of learning the standing and pecuniary condition of the debtors whose obligations he was about to receive from complainant, and having deliberately entered into his agreement, without fraud or misrepresentation, he will not now be allowed to repudiate it, on the ground that it is inconsistent with public policy.

The bill does not seek to repudiate the obligation of his bond; nor is the evidence adduced with that intention. The theory of our case, and the effect of our testimony, is that there was a parol agreement for the discharge of our bond. None of the authorities quoted on the other side, conflict with this proposition. The rule is, that no parol agreement or evidence is admissible to contradict or alter a written agreement, or interpolate any unexpressed condition; but all admit that a parol agreement, in discharge of the agreement, or a subsequent parol agreement as to the mode of payment, is perfectly legitimate. Our contention is, that complainant's liability arose from his position as administrator, that its extent was defined by the settlement made between him and defendant, and its evidence is furnished by the bond of Oct. 24th, 1842. All this we admit; we don't pretend to deny it; we only charge, and seek to show, that by a subsequent, independent, parol agreement, the obligee in that bond agreed to accept, and did accept, payment in a particular manner. This is not contradicting our bond.

FULTON, J.

I shall overrule the exceptions to the depositions, on the ground that they do not contradict nor vary the terms of the plaintiff's obligation; but only tend to show that, subsequent to its execution, there was a parol agreement to accept a partial payment thereof in a particular mode. Those depositions are very brief, very vague, and very unsatisfactory;

but this is the best conclusion that I have been able, though not without difficulty, to extract from them. In this point of view, they are legitimate testimony, for what they are worth. I understand the rule not to be controverted, that there is a broad distinction between the contradiction or modification of an instrument by parol proof, and a subsequent parol agreement *in discharge* of the instrument. I understand these depositions as tending to prove the latter, and for that purpose must admit them. How far they do go to prove this fact is another question, and this leads me to a brief examination of the case on its merits.

The statements of the bill are very vague and hard to understand. There are discrepancies upon its face; but looking at it with some care, I come to the conclusion that it substantially alleges only a parol agreement in discharge of the bond, made subsequent to its execution. The obligation of that instrument is not denied, nor sought to be evaded. The *gravamen* of the bill is, that the bond is *satisfied*, that it has been discharged by subsequent arrangements. I do not think this is wrong. If clearly made out it would entitle complainant to relief.

Is it made out? I think not. The defendant flatly denies every material allegation of the bill; and we all know the burthen which that denial casts upon the plaintiff. He was aware of it, and adduced the necessary number of witnesses to countervail that denial. His misfortune is, that his witnesses do not effect this purpose. He charges that *Baldwin's* note was accepted in part discharge of *this debt*; his witnesses do not specify any particular debt to which it was to be applied. He alleges that the debt was *considered good*, and was taken, without recourse, at its nominal value; one at least of his witnesses says that complainant himself told respondent it was a doubtful debt. There are other discrepancies and inconsistencies between the bill and the evidence, which I need not stop to detail; but on the whole I am satisfied that the evidence does not sustain the allegations of the bill, nor rebut the express denial of the defendant. Of course the injunction must be dissolved. It is another instance of the effect of carelessness and negligence, in failing to take the most simple, ordinary and obvious course, in perpetuating the facts of a transaction.

This conclusion dispenses with the necessity of considering any other question in the cause.

Injunction dissolved.

CONSTABLES.—STATUTORY.—PRESUMPTION.

Hendrick v. White et als.

Circuit Court of Carroll County, Va. August Term, 1857.

The neglect of a constable to proceed in the collection of a debt affords no answer to the statutory presumption that he has received the money, after the lapse of six months from the date of his official receipt.

A constable has no right to judge of the sufficiency of the defence to a claim entrusted to him for collection.

A judgment against the plaintiff in a warrant, which judgment is afterwards set aside and a new trial granted, does not excuse the constable from further prosecution of the claim.

This case was tried in the County Court of *Carroll*, and an appeal to the Circuit Court was asked for.

It was an action of debt in the name of the Commonwealth, at the relation of *Robert Hendrick* against *David White*, a constable, and the sureties in his official bond. The declaration was in the usual form, setting out the bond and condition, and assigning two breaches.

First—That *White* had officially received certain debts from the relator, to be collected; that he *had collected* the money and failed to pay it over.

Second—That he had so received certain debts to collect for the relator, and *had failed to collect* them when he ought to, and could have so done.

The defendants pleaded, “conditions performed,” and “*non damnificatus*.”

The case was tried in the County Court, at its November term, 1856, when the jury found a special verdict, substantially as follows:

That on the 4th day of October, 1856, the defendant *White* was a constable of the fourth district of *Carroll* county, and that the other defendants were his official sureties. *That* on that day the relator placed in the hands of *White*, to be warranted for, two claims on *R. S. Coleman*, who resided in said district, one a note for \$41, the other an account for \$26 50, for which claims *White* executed his official receipt, promising to collect or return the claims as the law directs. *That* on the 9th day of October, 1855, more than a year after he had so received the claims, *White* sued out, from under the hand of *James Worrell*, a justice of *Carroll* county, two warrants

against *Coleman*, one on each debt. *That* the warrants were made returnable on the same day they were issued, at the house of *Worrell*, which is in the *first* district of the said county. *That* said *Coleman* appeared, according to the mandate of the warrants, and made defence on the ground, that the claims were *gambling debts*. *That* the justice dismissed the warrants, giving judgment that the relator should pay the costs. *That* the relator was not present at the trial, and had no knowledge of the issuing and return of the warrants, nor of the trial. *That* within thirty days after the trial, the relator, after giving proper notice, applied to the justice for new trials, who, thereupon, set aside the former judgments, and granted new trials, endorsing an order to that effect upon each warrant, and directing the new trials to be had at the Grayson Sulphur Springs, in the *fourth* district, on the fourth Saturday in November, 1855, and delivered the warrants so endorsed to the constable, *White*, with directions to return them to the place and day therein named. *That* said Sulphur Springs is a place where warrants are returned and tried on the 4th Saturday in each month. *That* the relator attended at the place and time fixed for the new trials, with his witnesses, and a justice of the peace was then and there present, ready to try the causes; but said *White* did not attend—the warrants were not returned, and no new trials were had. *That* the relator attended at the Springs on the 4th Saturday in each of the four succeeding months, but said *White* never returned the warrants—never sued out any other warrants, but retained the papers in his own hands until the expiration of his term of office, and up to the time of finding this verdict. Now, if upon these facts the law be for the plaintiff, we find," &c.

Cook, for the plaintiff, argued, that upon this verdict there could be but one judgment. The Code (p. 598, § 13,) makes a constable's official receipt *prima facie* evidence, after the lapse of six months, that he has received the money due upon any claims placed in his hands. Here the officer held the claims a much longer period. All we had to do was to show his receipt, dated more than six months prior to our suit, and we made out a *prima facie* case. He attempts to rebut this by showing his own neglect and misconduct. He did not take out warrants for more than a year, and when he did so, went out of his own and the defendant's district. The law (C. p. 596, § 2,) is explicit, that the warrant shall be made returnable in the district where the defendant resides. The justice issuing the warrant and trying the cause cannot be presumed to know the defendant's residence; and we see that

he corrected the error as soon as it was brought to his attention. But the constable was bound to apply for a warrant in the proper district. The relator was not bound to look out of the fourth district. But the constable wholly neglected his duty, even after his first error was corrected. The verdict does not find *collusion* between the constable and the defendant, and we are not at liberty to infer it; otherwise there are strong grounds to suspect it. The constable waits more than a year before he sues at all—then goes into a wrong district; and when sent to the proper place wholly fails to perform his duty. The facts in no wise rebut the *prima facie* liability of the officer. It is entirely consistent with all the facts proved, that the constable may have received the money and failed to act so as to retain it.

McCamant, for the defendant, contended, that the facts showed that the defendant had not received the money, and so answered the *prima facie* case under the 13th section. He also labored to show that the relator could not have collected these debts, because they were tainted with gaming, and, therefore, he had *not been damnified* by the officer's neglect; and the second plea was sustained. There was enough in the verdict to show that these were gaming debts.

Cook in reply. The verdict does not show that these were gaming debts. That was *Coleman's* assertion; and that question was to have been settled on the new trial. *Non constat* that we could not have shown the contrary. The new trial destroys every presumption that such was the nature of the debts. But the constable had no right to exercise his judgment in the premises, and must do so at his peril. His duty was to return the process, and let the justice decide.

The County Court gave judgment for the plaintiff, for the penalty of the bond, to be discharged by the amount of the claims.

Now, at this term of the Circuit Court, *McCamant* presented a copy of the record with a petition for a *supercedeas* to the judgment; but *FULTON, J.*, refused to grant a *supercedeas*, saying that the judgment was unquestionably correct on both assignments of the breach of the condition of the bond. It was too clear a case for any interference.

AWARD.—PLEADING.—PARTNERSHIP.

Stuart vs. Hale and others.

Circuit Court of Carroll Co., Va. August Term, 1857.

An award must be certain, final, and mutual, to sustain an action of debt.

One partner cannot sue his co-partners at law, during the continuance of the partnership. This is the general rule; but where a particular portion of the transactions has been withdrawn from the general business, for settlement, and upon such settlement a balance is found due to one partner, he may sue at law for such balance.

A plea that the plaintiff and defendants are partners, that the causes of action arose out of the partnership affairs: that the partnership is still in existence, not having been dissolved, and that no settlement of its affairs has ever been made, is good upon demurrer; and if the plaintiff relies upon a *partial settlement* he must *reply* that fact.

A replication must conform to and support the declaration; if it does not, it will be *rejected* upon objection, and not allowed to be filed.

John G. Stuart brought an action of *debt* against *F. L. Hale* and *eleven* other defendants, in the Circuit Court of *Carroll* county. In his writ and declaration the plaintiff demanded \$4,219 80. The declaration contained three counts; but nothing turned upon the second and third counts, which were the common counts in *debt on simple contract*, one for money paid, laid out and expended, the other upon an account stated.

The *first* was the important count. It stated that certain differences having arisen, and being depending between the plaintiff and defendants, they, on the 15th day of October, 1855, entered into a written agreement, whereby two persons therein named were to adjust certain matters of difference between the parties; and the declaration alleged that the arbitrators did proceed to make the settlement, and awarded that the defendants should pay the plaintiff \$4,219 80, which the defendants had failed to pay, &c.

The defendants pleaded *nil debit* and payment, to which the plaintiff replied generally, but nothing turned on these. The questions in the cause turned upon two other pleas. In the first the defendants craved *oyer* of the alleged submission and award, and pleaded, "*no such award.*" Upon *oyer* the operative part of the submission was as follows:

"The said F. L. H. and W. L. are to take the books and accounts of the *Meigs County, Tennessee & Virginia Mining Company*, as kept by *John G. Stuart*, as president thereof, and those acting under him, and ascertain from the same the amount of money which has been received and properly disbursed for said Company, from the 10th of October, 1854, the time said *Stuart* was elected president of said Company, up to the present time. But said receipts are first to be applied in payment of the amounts due and owing by said Company on the October settlement, 1854. Said investigation and report, when made, shall determine the amount of disbursements and expenses paid out by said *Stuart* during said time herein specified, and for which said Company shall be liable under this obligation." And then followed provisions as to payment. This paper was signed by the defendants but not by the plaintiff; but it contained a memorandum inserted after all other terms, that "this award is to be binding on said *Stuart* as well as upon the said obligors."

The second plea was in these words: "And the said defendants, for further plea say, that the supposed debts and causes of action in the declaration mentioned and set forth, arose from and out of the transactions, dealings and affairs of a certain partnership and firm called and known as "*The Meigs County, Tennessee & Virginia Mining Company*," of which said partnership the plaintiff and defendants were and are all members; that the said debts and causes of action were and are all connected with the affairs and dealings of said partnership; that said partnership is still in existence, never having been dissolved, and its affairs and business have never been settled and closed; that it is still carrying on business, and the plaintiff and defendants are still members thereof."

To this second plea the plaintiff *demurred*, and the defendants joined in the demurrer. To the first plea the plaintiff *tendered* a special replication, which, after referring to the submission, is as follows:

"We (W. L. and F. L. H.) have proceeded to examine, state, settle and adjust the accounts of *John G. Stuart*, and the *Meigs County, Tenn. & Va. Mining Co.*, and find them to stand as follows, to wit:

The disbursements of said *Stuart*, including his salary, and disbursements for the store, from Octo'r, 1854,
to October, 1855, to be - - - - \$ 28,174 81

Including the disbursements made by *McCorkle & Hale*, as shown by his books, and mostly supported by vouchers and other evidence.

We further find, that the said *Stuart* has received, as stated by him and the company, *in the aggregate*, from the commencement of operations, say 2d March, 1854, the sum of \$34,683 49

Of this sum of \$34,683 49, it appears that said *Stuart* had received, prior to and at the October settlement, 1854, the sum of - - - - 8,307 50

Leaving this amount, - - - - 26,375 99
received by said *Stuart* during the past year; - - - -
showing this sum of - - - - \$ 1,798 82

as the balance due him for salary and disbursements for the past year, if we have made no errors; which we reserve to be corrected.

The said *John G. Stuart* reports to us that he has expended and disbursed for said company, prior to October, 1854, the sum of 10,728 48 and that he has received to that time the sum of - - - - 8,307 50

Which would leave a balance due him - - - -
for that year, of (\$2,420 98,) - - - - 2,420 98

Which would make the total sum of - - - - \$4,219 80
after deducting his *pro rata* upon two shares of said company.

This last *statement*, up to October, 1854, we make upon the statements of said *John G. Stuart*, and also from a resolution of said company, passed at the October meeting, 1854: *as the settlement up to said October, 1854, has not been before us for investigation.*

The foregoing sum of \$1,798 82 cents we award as being due the said *John G. Stuart* from said company from October, 1854, to the present settlement, as hereinbefore stated; all of which is respectfully submitted.

We, therefore, further award, that the foregoing receipts for money received by said *Stuart*, shall be first applied to the payment of the amount that may be due upon said October settlement, 1854, and after applying said receipts to the payment of what may be due upon said October settlement, 1854, said company shall pay to the said *Stuart* the amount

due him as shown from the receipts and disbursements in this award."

To the reception of this replication, the defendants *objected*. Cook, for the defendants, in support of the objection.

Every replication must conform to, and fortify the declaration. It must answer the whole of the plea, and if bad in part, is bad in the whole. It must be certain, direct and positive, and not argumentative, and it must be triable. 1st Chitty on Pleading, 617-18-19. Tried by any of these standards, this replication is fatally defective. The count alleges an award of the sum of \$4,219 80 cents; upon the plea of *no award*, it is necessary to set out the award *in hæc verba*: and in this instance it is necessary to show an award for that very sum; and if it be not shown, the declaration is not supported and fortified, and plaintiff must go out of court. Is such an award set out in this replication?

This award is good as to the sum of \$1,798 82. No question is raised as to that. We are ready to meet the demand as to that sum upon the plea of payment. But this is not sufficient. The replication must meet the whole plea of *no award*. That plea goes to the whole count which sets out an award for a much larger sum. We contend that this replication shows no award of the \$2,420 98 cents, which is the *real sum* in dispute in this cause, and that as to that part of the \$4,219 80 cents, it does not answer the plea, and not answering a part, it is bad for the whole.

Is there any award of the \$2,420 98? We contend not. In the first place, the matters in relation to which it is now demanded, are not in the submission, and it is unnecessary to quote authorities to show that an award as to matters not within the submission is impotent; but see *Martin v. Martin*, 12 Leigh, 495. The language of the submission expressly restricts the authority of the referees to an adjustment of the accounts concerning monies "received and properly disbursed for said company from the 10th day of October, 1854, the time the said *Stuart* was elected president, up to the present time." "Said investigation and report shall *determine the amount* of receipts and disbursements paid out by said *Stuart* during said time." It is true, that between these two sentences are found the words, "but said receipts are first to be applied to the payment of the amounts due and owing by said company at the October settlement, 1854." Owing to whom? It is not stated in the submission. Those amounts, if we are to take the plaintiff's statements as correct, had already been ascertained. The purpose of the submission is apparent; it was to have an account of the plaintiff's admin-

istration of the affairs of the company while *under his management*, and his administration is shown by the submission, to have commenced on the 10th October, 1854, "when he was elected president."

But the arbitrators do not attempt to go beyond the submission. They report that plaintiff claims a certain balance as due to him upon transactions prior to 11th October, 1854. They no where endorse the truth of that claim. He *procures* them to make a certain hypothetical, one-sided statement; and then tries to convert it into an authoritative decision that a given amount is due him. The most that can be made of this matter is that they find a certain result to flow from his statements, provided they be true.

But if it be admitted that the transactions prior to October 10th, 1854, are within the submission, and that the arbitrators intended to award concerning them, they have failed to do so. They have used no language which can be held to ascertain any certain sum to be paid on that account; nor have they awarded that any such sum, if payable at all, is to be paid *to the plaintiff*. By an inspection of the award, and an ordinarily careful scrutiny of its language, it will be seen that the referees well knew how to express themselves when they were dealing with *fixed amounts*, and with the *parties to this suit*. They do not ascertain any amount to be paid upon the accounts prior to October, 1854. And we are left in the dark as to the person to whom it is to be paid. Though the company might be under liability on this account, *non constat* the plaintiff is the person entitled to enforce that liability. It may be that other persons are entitled to those monies. The award must be *certain*, positive and direct. It must fix the sum to be paid either upon its face or by reference to some other distinct standard. *Cauthorn v. Courtney*, 6 Grat., 381. Here there is neither. It must be *final*; here the conclusion can only be arrived at by another settlement, and that settlement as to things which the arbitrators distinctly declare that they did not take into consideration. This part of the award falls within the operation of the language of TUCKER, P., in *Byers v. Thompson*, 12th Leigh, at page 559: "It wants that *finality* which is essential to every award. It wants that final determination of the judgment which is essential to a decision. It is a suspended and not a final judgment, and of course can be no award." The language is precisely applicable to this declaration of the referees. To settle the amount, if any, to which the plaintiff may be entitled under this branch of the enquiry, would involve the

necessity of a chancery suit, and therefore this replication is not *triable* in this case.

To hold this an award would preclude the defendants from an enquiry, essential to the protection of their interests. The plaintiff alleged before the arbitrators that he had expended certain large amounts prior to a certain period, and that up to that period he had received only a certain much smaller sum. But it does not follow that he is therefore entitled to demand the balance from his co-partners. There may be grave questions as to the several amounts which each may have severally expended and received. They too may have demands to the payment of which he is equitably bound to contribute; and we should thus be either deprived of all opportunity to be heard, or forced to the settlement of partnership accounts in an action of debt.

The replication then setting out an award of an insufficient character, does not support the count, and ought not to be received.

McCamant, for the plaintiff, in support of the replication, and also of the demurrer to the second plea.

Every reasonable presumption is to be made in favor of an award. *Armstrong v. Armstrong*, 1st Leigh, 491. This doctrine extends as well to the question, whether the award is within the submission, as to that of the sufficiency of the award itself. It is submitted that that portion of the submission which directs the application of the receipts to the payment of the claims outstanding at the October settlement in 1854, is broad enough to cover the award of the \$2,420 98 cents. What *receipts* are to be so applied? Unquestionably those monies received by plaintiff *after* he became president; those monies which came into his hands *after* the 10th October, 1854. The effect of such an application of those funds would be to increase the balance due him on the final settlement. So the arbitrators evidently understood it: for they direct the receipts to be so applied, and *then* that plaintiff shall have payment of the amount due him, as "shown by the receipts and disbursements in this award." It is true, it would have been more clear and distinct if they had subtracted the \$2,420 98 cents *from* the amount of his receipts during the year, thereby squaring the account on the 10th October, 1854. But what would have been the result? It would have left the final balance exactly the sum for which we contend, and which is named in the suit. The intention so to do is apparent upon the face of the award, and the court will give effect to that intention. That amount is made sufficiently certain by reference to the uncontradicted statement

of the plaintiff, which the defendants might have controverted before the arbitrators, as well as by reference to a resolution of the company itself, and when there is anything to which clear reference can be made, it is not necessary to incorporate it, *totidem verbis*, into the award. *Macon v. Crump*, 1 Call., 575. This award, then, by necessary intendment, is for the full sum claimed in the declaration, and sufficiently conforms to the count.

As to the demurrer to the second plea. We do not deny the general rule to be that one partner cannot sue another *at law* during the continuance of the partnership. But there are exceptions, and one exception is where a portion of the accounts has been *separated* from the mass, and a settlement made of that portion. In such case the partner in whose favor the balance is found may sue *at law* for that balance. *Collyer on Partnership*, book 2, chap. 3, sections 272 to 275. *Story on Partnership*, 333, *in notes*, and cases there cited. In this plea the defendants do not negative any such partial settlement. We contend that the plea to be good should contain the additional allegation that "no settlement has been made touching the matters and things in the declaration set forth."

Cook in-reply. The demurrer is not well taken. The plea affords a complete answer to the count. If the plaintiff relies upon any partial settlement, he should reply that fact specially in confession and avoidance of the plea.

FULTON, J.

At the first blush I was inclined to think that this replication set out an award of the entire sum claimed in the count; but further examination, and a careful analysis of the paper satisfies me that it is an award of only the sum of \$1,798 82, the amount due upon the transactions of the year in which the plaintiff administered the affairs of the Mining company. I am inclined to consider the words of the submission broad enough to have authorized the referees to direct payment of the prior balance, if they had found that balance to be actually due, and due to the plaintiff; and by that favorable construction which we are directed to give to awards, their language might be interpreted into a recognition of the validity of plaintiff's claim to that sum. But is this allowable? An award must be *certain*. Its very object is to define with precision the rights and liabilities of the parties. It is true that a particular arrangement of the items with which the arbitrators were dealing, would have produced the result contended for by the plaintiff. The paper shows the elements of such a consummation. The arbitrators

might have directed, in terms, that a sum of \$2,420 98 cts. should have been deducted from \$26,375 99 cents, the amount of his receipts during the year, and applied to the payment of the balance alleged to be due on the 10th October, 1854, and the result would have been to increase the balance in his favor up to the very sum which the plaintiff demands. But have they done this? I think not. It is contended that the *intention* so to do is apparent upon the face of the award. I cannot discover it. The arbitrators are cautious in their statement of this part of the transactions. They inform us that it is made upon the plaintiff's information, and that the subject matter upon which he gave them such information was not before them for investigation. Moreover, *intention* is a very dangerous ground to go upon in the exposition of an award; a decision which ought to be expressed in clear and unmistakable terms. When we enter into the consideration of an arbitrator's unexpressed intention, we enter a pathless forest, and it is hard to tell where or how we shall emerge. An award cannot be *argued out*, the object of a reference is to do away with all argument and questions of intention.

But, however clear the right of the referees to look into the transactions prior to October 10th, 1854, and however manifest their intention to adjust those transactions, they certainly have not effected that purpose. They have not specified any sum as being due upon these transactions; still less have they declared any sum to be due to the plaintiff in regard to those dealings. His outlays during a particular period may have exceeded his receipts, and yet he may not be entitled, on that account, to claim anything from his co-partners. There may be demands to which he is liable, which will offset his claim. It may be remarked, that the language in which this claim is alleged to be set up, does not amount to an acknowledgment of debt. He only reported to the arbitrators that his expenditures amounted to a particular sum, and his receipts to a smaller one; but even he does not claim that they owed him the balance, or if he did make such claim, the arbitrators do not state it. Even if he did so claim, the referees do not fix any amount: a further settlement and computation only can fix that amount. Another course must be adopted to adjust those items. On this head the award lacks that finality and completeness essential to its validity.

Nor is this uncertainty removed by reference to any standard which can supply the omission. It is true that an award may be held sufficiently certain when it refers to some

other document, or fixed standard. In this case there is mention made of a resolution of the company; but we know not what resolution, neither its character nor purpose; and it is not made part of the award.

On the whole I can find no award for more than the \$1,798 82 cents. To be good, the replication ought to have shown an award for \$4,219 80, and not doing so must be rejected.

I also think the demurrer to the second plea must be overruled. No question is raised as to the general rules on this subject. The plea presents a good answer to the count: to obtain the benefit of a partial settlement the plaintiff should have replied the fact specially. The defendants are not held to negative the exceptions to the general rule. But such a special replication could only bring out the award, and thus we should again meet the question already decided.

The plaintiff in this action ought to go only for the smaller sum, which he is undoubtedly entitled to, and will recover, unless it has been paid.

McCamant asked that the pleadings might be set aside, and leave given him to file an amended declaration, which was ordered, the other side consenting—the plaintiff to pay costs of all the pleadings thus set aside.

EVIDENCE—CONFESSION.

United States v. Cooper.

District Court for Western Virginia, at Wytheville, October Term 1857.

Confessions made to a justice of the peace, while officially engaged in the examination of a criminal charge, are inadmissible, if obtained by any inducement held out by the justice.

A prisoner having been once induced, by improper influences, to make a confession, no other confessions of a like character, though made at a subsequent time and to different persons, are admissible, even when voluntarily made, unless it be shewn that the prior improper influence has been removed, either by an explicit and distinct warning, or some other equally cogent means.

At the October term, 1857, of the District Court of the United States for the Western District of Virginia, at Wytheville, an indictment was found against *James Cooper*, charging

him with abstracting and embezzling certain letters, taken by him out of a mail bag; he being a mail carrier. Plea, *not guilty*. The prisoner is a boy, fifteen years old.

F. B. Miller, United States District Attorney.

Floyd, Cook and Brown for the prisoner.

Robert F. Dorton was the first witness called for the prosecution, and he testified, in substance, as follows: "The prisoner was a mail carrier on a route leading through *Scott* county, and he carried the mail from Pattonville to Rye Cove in that county. I am a justice of the peace for *Scott* county. On the 27th May last, the post-master at Rye Cove came to me, and said that the mail had been robbed, and applied for a warrant against the prisoner. I concluded to go to the post office before issuing a warrant. I did go, and found the prisoner there in custody. I examined the mail and mail bag. There was a hole, or opening in the bag; and three or four letters were in a very confused and improper condition, having evidently been opened. I said to the prisoner, "*Mr. Nicholls* (the post-master at Pattonville) never put up the mail in this condition. It is a very plain case. You might as well confess the whole matter. It will not make the case any worse for you. Thereupon, he said that he had taken the letters out of the mail bag, and that he took them out to get money."

The prisoner's counsel immediately objected to this testimony, and moved the court to exclude from the jury all evidence of confessions obtained under such circumstances. They relied upon *Smith's* case 10th Grattan, 734. Before deciding the question, the Court propounded some questions to the witness, from which it appeared uncertain whether the warrant was actually issued before the confessions were made or not; but the boy was in custody. It was also left uncertain whether the prisoner knew that the witness was a justice or not; but the witness distinctly stated that he was acting in his official capacity, and *investigating the charge* when the confessions were made.

BROCKENBROUGH, J.

The rules relative to the admission of confessions in criminal cases are well known to the profession. It has long been held that a free, voluntary confession is the most clear and satisfactory evidence of guilt. But to produce this effect, the confession must be strictly of the character I have mentioned. Such is the infirmity of human nature, in circumstances so distressing as those which often surround a prisoner, that men have been known to make false confessions, under a hope of ultimate escape. It has therefore been wisely and mercifully settled that such

evidence is to be received with very great caution. If indeed either by threats of injury, or hopes of benefit, made or held out by others, standing in certain relations towards the prisoner, or the offence, then the confession must be rejected.

Among the rules most carefully elaborated, and strictly enforced is this: that if the confession have been made to a *person in authority* in the premises, and have been induced by anything said or done by such person, calculated to excite either hope or fear in the prisoner's mind, then the confession is inadmissible. It has always been understood, without a dissenting voice, that a justice of the peace engaged in the official investigation of a criminal charge, is a person in authority in regard to such charge. In regard to persons bearing that character, too much care cannot be exercised to prevent them from this reprehensible tampering with parties arraigned before them. In this case, certainly the rule ought not to be relaxed, when we look to the prisoner's extreme youth, and the pretty plainly apparent fact that he does not at any rate, possess more than a very moderate share of intellect. I should have no hesitation in rejecting this testimony if it were not for the bearing of the decision of the Court of Appeals of Virginia in *Smith's* case.

In that case the prisoner made an explicit and important confession to the person to whom he was an apprentice, and that person was also a justice of the peace; but he was not engaged in the investigation of the offence, and had nothing whatever to do with the prosecution. It was contended that both in his character of master and of justice, this person was a *person in authority*, in the meaning of the rule. He induced the prisoner to make the confession. It was objected to, but the Court of Appeals decided that the confession was admissible. I cannot concur in the propriety of that decision. I think it goes a bow-shot beyond all the former authorities. Moreover, it is to be noticed that the court was divided. It was a decision by three judges against two. If I were a Circuit Judge of Virginia, I should give the Court of Appeals an opportunity, if possible, to revise the decision. But in the capacity of a Federal Judge, I am bound by the decision. By the Act of Congress under which I derive my powers, the law of the State wherein the Court is held is made the rule of its decisions; and it is well settled that the judgment of the supreme judicial tribunal of a State is the authoritative exposition of the law of that State. I would therefore be bound by the decision in *Smith's* case, if I did not think the case at bar could be distinguished from that case.

And I do think it is clearly distinguishable. This case contains the important element, wanting in *Smith's* case, that here

the justice was officially engaged in examining the very charge in relation to which he induced the prisoner to make the confession. He was undoubtedly a *person in authority* in the premises. I do not consider it material to enquire whether the warrant of arrest had actually emanated, before the confession was made. The prisoner was confronted with his judge and his accuser; and his conduct was the subject of a pending enquiry. Nor do I deem it important to enquire into the fact as to his knowledge of Mr. *Dorton's* official character. At the most this is an open question, and the prosecution ought to remove all doubt as to the fact, for before the confession can be received, the United States must show the propriety of its admission. I think I am not only justified in presuming that the prisoner did know that Mr. *Dorton* was a justice, but that I am bound so to presume in the absence of proof to the contrary. The evidence must be excluded.

Mr. Nottingham, the jailor of Scott county, was introduced, and said, "I know nothing of this case, except from confessions made to me by the prisoner, after he was committed to prison. He was confined in my jail on the 27th day of May last, and remained there till the 6th of September, and during that time he made several different confessions, relative to this matter." The prisoner's counsel objected to the admission of these confessions, until it should appear that full and fair warning had been given to the prisoner as to the effect of his confessions. They contended that when it has once been shewn, that the prisoner has been improperly induced to make a confession, no subsequent confession, though made at other times and to other persons, can be used against him, unless it be shewn that his mind has been completely relieved of the improper influences formerly operating upon it. The Court enquired of the witness whether he had warned the prisoner of the consequences of his confessions. He answered that he had not, but had only told him "that it was a Penitentiary offence." He further stated that the confessions made to him were substantially identical with that made to the examining justice. He could not state the exact time at which the first confession was made; but thought it must have been soon after the prisoner came into custody.

BROCKENBROUGH, J.

A good abstract of the law on this point is found in 1st Greenleaf on Evidence, Section 221. I there find the rule laid down on satisfactory authority, to be, that where improper means have once been used to induce a confession, which has therefore been rejected, a subsequent confession cannot be received, unless it appear that the influence of those improper means has been to-

tally done away with. From lapse of time, or other circumstances and facts, the influence of former inducements may be presumed or proved to have ceased; but “in the absence of any such circumstances, the influence of the motives, proved to have been offered, will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence; and the confession will therefore be rejected.

Applying this rule to this case, there can be no doubt as to the result. It is not pretended that any warning was ever given to this boy, after he was imprisoned, which was on the same day that he made his original confession, already rejected. A sufficient period of time had not elapsed to raise any presumption of freedom from improper influences; and this case affords an excellent illustration of the necessity for such a restriction. This boy has been improperly induced to make a confession. *He* could not know that such an admission could not be given in evidence. *He* considered his fate sealed by his former declarations; and, in the desperation of his condition was ready to open his heart to any one who would listen to him. It would be cruel oppression to permit such admissions to go in evidence. Mr. *Nottingham* must stand aside.

Robert Gibbony, Deputy Marshal of the District, was called to the stand. He said that on the 6th September, he took the prisoner out of *Scott* jail, and removed him to *Wytheville*. From *Estillville* to *Abingdon* he travelled with the prisoner in a buggy. On the way the prisoner made confessions to him, similar to those spoken of by the other witnesses. The witness gave prisoner no caution, but suffered him to talk as he pleased, using no efforts to extract anything from him; and his statements were voluntary so far as this witness was concerned.

BROCKENBROUGH, J.

This evidence falls within the same category as that of the jailor, and must share the same fate.

There being no other evidence, the jury without leaving the box found the prisoner *not guilty*.

EXECUTIVE AUTHORITY.—JUDICIAL ELECTIONS.

We publish the accompanying correspondence as it presents on both sides very able views of a very interesting question. The importance of the subject discussed must be our apology for the lengthy space it occupies.—[Ed.]

RICHMOND, August 5, 1857.

Sir—The Secretary of the Commonwealth has submitted to me the papers relating to the election of a Judge on the 23rd ult., in the Seventeenth Judicial Circuit, with a request that I would give an opinion as to the extent and character of the powers vested in the Governor in respect to the same.

It appears, by the certificate of *three* of the Sheriffs of the counties in the circuit, that Mr. Fulkerson has been elected—the terms of the certificate being substantially in the language of the return required by the Act of Assembly—(Sess. Acts, 1852, ch. 69, §8.)

It appears, by the certificates of *four* of the Sheriffs of the counties of the Circuit, that Mr. Stras has been elected Judge. The form of the certificate is the same.

There is one peculiarity in each of these certificates. In the body of each the names of all the Sheriffs assembled are set out, as if it were intended all should sign—showing the difference of opinion of all the Sheriffs upon the question of return.

The certificate, signed by the four Sheriffs, to the election of Mr. Stras, has appended to it, on the same sheet, a paper signed by the same parties, that Mr. Fulkerson is elected—if all the polls from Lee county are to be counted—but that, thinking that the poll from seven of the precincts of that county are not legally certified, they have rejected and not counted them, and thus have given the return to Mr. Stras.

The objection to the poll at one of the precincts is, that it is not certified by the Conductor, though it is by the Commissioners; and to those at the others, that they are neither certified by Conductors or Commissioners. Upon inspecting the poll books for these precincts, I find that there were Conductors and Commissioners sworn for each precinct, according to law; that the polls are taken in the usual form, under a suitable caption; and that the clerk has sworn, (as appears of record,) that the polls were fairly and properly taken according to the lists made out.

It is true, that the law requires the Conductors and Commissioners to certify the correctness of the poll. This must be,

as it has ever been, construed as directory, but not essential to the validity of the poll. It was never designed to defeat the popular will by a deficiency in formalities, which the law only prescribed to secure its full and free expression; and however important these may be, it would be monstrous to set aside the voice of the people, because a public officer failed to do his duty. This would be to put the form before the substance, to prefer the shadow to the reality.

I am therefore, decidedly of opinion, that upon the returns of the Sheriffs, with the facts stated by the majority, and the poll books themselves, there was no ground for the returning officers to declare Mr. S. as elected.

Nor was there, in my opinion, any power vested in the Sheriffs to reject the polls, which the Sheriff of Lee carried with him to their place of meeting. By carrying them he recognized them as polls which must have been delivered to him by the conducting officers at the precincts. See ch. 7, § 9; ch. 8, § 3, of Code of Virginia.

Chapter 8, section 1 and 2 gives no power to the Sheriffs to decide upon the validity of a poll, but only a power to *strike from the polls any votes which the law directs to be stricken from the same.* This is a power to *purge*—not to *reject*, the poll. The power to do the one, not only does not include the other, but would seem to exclude it.

It is true, that if there were no evidence, either on the face of the poll-book, or *aliunde*, to satisfy the conducting officer at the Court House, that it is a poll, legally taken, he may disregard it, but he must do so in the absence of all evidence, either adduced, or to be obtained, that it formed a part of the expression of the will of the electors. No *technical* objection will suffice to protect him from the censure of setting aside the public will by his own *fiat*.

I think, therefore, that the sheriffs there assembled could not disregard the polls from the precincts of Lee county, because the Sheriff of that county authenticated them, by their production, and he had no sufficient ground to have rejected them.

It appeared to him, and to them all, that a conductor and commissioners were sworn to do their duty. It was to be presumed that the sworn duty was performed, until the contrary was shown. The oath of the clerk, who recorded the votes taken, that they were regularly taken, and the certificate of the Justice, to the affidavits of conductor, commissioners and clerk, afforded the strongest evidence that these polls were legal, though not certified as the law directs.

The facts are agreed by all the sheriffs, that Mr. Stras is elected only by rejecting a large number of legal voters, who,

if counted, would give the election to Mr. Fulkerson.

Shall the Governor commission Mr. Stras? I am decidedly of the opinion, that he is not *bound* to do so—and that he has *no right* to do so.

1st. He is not bound to do so.

The return is not given to Mr. Stras according to law. I doubt very much, if a majority of the Sheriffs can give the return, under the circumstances of this case. But even if they can, they have given it subject to the law upon the facts agreed—and it must be taken in that way—and if so, as I have indicated, the law is against Mr. Stras's claim to the office.

2nd. He has no right to commission him. "For each circuit a Judge shall be *elected by the voters thereof*." Const. of Va. Art. 6, §6. Upon the facts certified by the Sheriffs favorable to him, *it cannot be said that he has been elected by the voters of the circuit*.

"Judges shall be *commissioned* by the Governor." Const. of Va., Art. 6 § 14. "Commissions and grants shall run in the name of the Commonwealth, and *be attested by the Governor*." Id. Art. 5.

A commission is the delegation of official trust. A commission to Mr. Stras would be the delegation by the Commonwealth of judicial power, to him as the elect of the voters of the circuit. The commission is the result of the election. The election is the ground of the commission. How can he have a delegation of Judicial power from a State, whose constitution declares him not entitled; unless it be obtained by a breach of trust, awarded in her name, by him whose attestation alone gives her commission its force and its validity?

To the Governor has been entrusted the power to grant her commission. In attesting it, the duty is imposed upon him, to see that he who claims it, is entitled to it under the Constitution and laws of the State. In this case, he cannot so attest, and unless he is compelled to execute the mandate of the return of the sheriffs, the discretion to refuse to do so, gives him full power to judge upon the propriety of granting the commission to him who has received their return.

The return, when it is *certain*, is only *prima facie*. This was the extent of the power of the sheriffs. (Acts 1852, ch. 59, §§ 7, 8; referring to Code of Virginia ch. 8, giving like power in the two cases.) The power to commission, includes the power to pass upon the validity of a *certain* return. Where it is uncertain and double it includes a power to decide upon the facts stated, or adduced, in respect to it. It is a function conferred by the Constitution, not prescribed by law; not

merely *ministerial*, in obedience to the return of the sheriffs *in pais*.

The Governor "*shall take care that the laws be faithfully executed*;" and shall commission judges. Can it be supposed, that, with the evidence upon the face of the paper on which the *uncertain* return is written, that the laws have *not* been faithfully executed, and that a return has been given to one *not* elected under the Constitution, the Governor is bound or would be justified in granting a commission in violation of law and Constitution?

In confirmation of this view, I may adduce the fact, that, while the Constitution provides for a contested election in the case of a Governor, it makes no provision for any other case, while it gives to him the power and imposes the duty of granting commissions to all other officers. And moreover, while the law provides for a contested election in case of a justice, sheriff and constable before a court, there is no provision for a contested election as to the office of judge. Can these omissions in the Constitution and laws be otherwise explained, than by attributing to the framers of both an intention to give to the power to commission the function of supervising and deciding, in connection with the sworn duty to take care of the faithful execution of the law, and to support the Constitution?

If this construction be not given, then it results that in respect to the important office of judge, the Governor is bound to obey the return of the sheriffs, made at the informal and hurried meeting the law prescribes, though the commission he grants is to a person never elected under the law, and holding the office against the authority of the Constitution; *and he may know it*.

I think, therefore, the Governor is not bound, nor has a right to grant a commission to Mr. Stras.

But can he commission Mr. Fulkerson; or order a new election?

If there has been an election by the voters of the circuit, the person elected has a right under the Constitution, to the commission, and they have a right to him as their judge. The Governor cannot set aside a valid election, nor take away a judicial office from one constitutionally elected, and then make proclamation for a new election.

If, upon the proofs as to the rejected polls in Lee county, either by the certificates of the commissioners, conductors, or others, the Governor shall be satisfied, or without further proof, is satisfied, that those polls represent a part of the legally expressed voices of the voters of the Circuit, then, upon the

agreed facts, certified by all the sheriffs, he will be authorized to commission Mr. Fulkerson.

If, however, the Governor shall be unable to satisfy himself that either gentleman has been elected, he may be compelled to refer the election to the people again, upon the ground, that, owing to the imperfections of all human institutions, the right cannot be ascertained. The novelty of the question presented in this case would make me hesitate more than I have done, except for the necessity of a speedy decision. I believe the views I have expressed will be found best to preserve inviolate the provisions of the Constitution, the substantial requirements of which should never be made to yield to forms, devised by the law as means to the attainment of constitutional ends. To surrender in this case any of these requirements to the forms prescribed by law, would defeat the popular will, to which the Constitution gives the supremacy. Between the two, I must bow to the greater.

I am, with high respect, your friend,

J. R. TUCKER.

Hon. H. A. WISE, Governor of Virginia.

I approve of the reference, by the Secretary of the Commonwealth, in my absence, of the questions arising under this election, to the Attorney General: and I fully concur in the reasoning and conclusions of his opinion. That *there has been a legal election*, in this case, *all the Sheriffs certify*, and it is not rightfully within the power of the conductors, or of the commissioners, or of the sheriffs, or of the Executive, or of all these combined, *now to set it aside either in whole or in part*. No mere failure of ministerial and executive officers to do their duty can either vitiate or nullify the votes of the people to elect a judge or other officer, if they, being legal voters, *did in fact*, at the time and places, and in the manner prescribed by law declare their votes. To have their votes returned and counted, is as much a right and as sacred as the right to vote according to law. Of neither right can any power in Virginia deprive them, by acts of either commission or omission; and neither depends on the acts of ministerial or executive officers. That the legal voters, at the precincts of Lee county, the polls of which have been rejected by four of the sheriffs, did so declare their voices, I am satisfied, from the returns and certificates which have been made. The votes were legally taken, of legal voters, but the polls merely were not properly certified. The officers, conductors and commissioners, at some of the precincts, have incurred penalties, but the legal voters are not thereby to lose their votes actually polled. There being sufficient evidence,

on the face of the certificates and polls returned, to satisfy me that a majority of the legal voters, on the day, at the places, and in the manner prescribed by law, did vote for Samuel V. Fulkerson, and that he was duly elected a Judge for the 17th Circuit of the Commonwealth—I, in the absence of special statute to regulate a contested election in such case, and acting under the general power of the Executive to “commission Judges” and to “take care that the laws be faithfully executed,” order a commission to be issued accordingly to the said Samuel V. Fulkerson.

August 8th, A. D., 1857.

HENRY A. WISE.

Here follows the substance of the letters already published, by Judge Robertson, in reply to the opinion of the Attorney General.—Ed.

HAVE WE A JUDGE IN THE SEVENTEENTH JUDICIAL CIRCUIT.

One there is certainly, *de facto*, actually holding a commission from the Commonwealth. But a commission is not necessarily valid, though issued in the name of the Commonwealth and attested by the Governor. It is essential to its validity that it should be given to one having a lawful title evidenced by legal proofs, in the language of the Attorney General, “*entitled to it under the Constitution and laws of the State.*”

Whether Mr. Fulkerson, then, is rightfully a Judge, is an open question. That it is one of great difficulty as well as novelty, the reference to the first law officer of the State, his elaborate opinion and acknowledged hesitation sufficiently evince; while the latitude and startling character of the doctrines and conclusions maintained in solving it, cannot fail to excite serious apprehensions in all who justly appreciate constitutional limitations of executive power.

The facts of the case are few and simple; the law, so far as it goes, however defective, is perfectly unambiguous. Whence, then, it may be asked, arises the difficulty? It is caused by an alleged irregularity in the conduct of the election, for which the law has provided no special remedy, and the attempt of the Executive to supply one, by a forced and unwarrantable construction of the constitution and laws.

I adopt, without repeating it, the statement of the case as made by the Attorney General. In an elaborate opinion he advised, *that the Governor could not lawfully commission Mr. Stras; but that he might lawfully commission Mr. Fulkerson, “if, upon the proof as to the rejected polls in Lee county, either by certificates of the commissioners, conductors, OR OTHERS, or without further proof, he should be satisfied that those polls represented a part of the legally expressed votes of the voters of the circuit.”*

But for the decided opinion, officially given by the Attorney General, to the contrary, and concurred in by the Governor, it would seem that the refusal of a majority of the returning officers to give the return to Mr. Fulkerson was alone an insurmountable bar to a lawful commission in his favor. It will not be denied, perhaps, as a general rule, that the commission should be in conformity with the return. The present case, however, is regarded as an exception. Irregularity and misconduct are imputed to the ministerial officers, sufficient in the estimation of the Executive, to vitiate their official proceedings. Alluding to the uncertified polls, the Attorney General says:

"It would be monstrous to set aside the voice of the people because a public officer *has failed to do his duty.*"

And the Governor pronounces sentence of condemnation in terms still more decisive and unqualified; he says:

"The votes *were* legally taken, of legal voters, but the polls, merely, were not certified. *The officers, conductors, and commissioners*, in some of the precincts, *have incurred penalties*, but the legal voters are not thereby to lose their votes actually polled."

Thus relieved from all obligation to respect the acts of the ministerial officers, the omitted certificates of the conducting officers were, in effect, supplied or dispensed with, the duly certified return disregarded and annulled, and Mr. Fulkerson, having the return of a minority only of the sheriffs, was appointed—more properly speaking, *elected*—and commissioned by the Executive. The officers impeached may, very possibly, merit the censures of their superiors; but, on the face of the proceedings, as stated, there hardly seems sufficient ground in strict law, or common charity, for the imputation of misconduct—or even of error.

ALLEGED MISCONDUCT OF THE CONDUCTOR AND COMMISSIONERS.

It is true, as the Attorney General remarks, that the law requires these officers "to certify the correctness of the poll." The design of the provision obviously was to prescribe the mode of authentication—but none can suppose that any obligation was thereby imposed upon them, to certify the correctness of any poll to which there existed a just exception. On the contrary, every sheriff, or other officer, &c., before he commences taking the poll, is required to take an oath, "to make a *true* return of the result of the election;" (Code, ch. 7, § 10;) and subjected to a heavy penalty *for making a false certificate or return.* (Ib. § 17.) Having then the undoubted right—bound, indeed, by duty and conscience, to withhold their certificates, if

there existed, in their opinion, a sufficient cause for so doing, such cause ought to be presumed, in accordance with the rule in favor of public officers, that all acts within the scope of their authority shall be presumed to have been lawfully done unless the contrary appear.

ALLEGED MISCONDUCT OF THE RETURNING OFFICERS.

The proposition that the sheriffs have no power to *reject* a poll or decide on its validity, if confined to a poll duly certified, may be admitted to be correct. In reference to *their* action, *valid or void*, is always a settled question, ascertained by *mere inspection*. If duly certified it is *ipso facto* valid; if otherwise, it wants the legal evidence of authenticity, and is as to them, *no poll*.

It is hardly accurate to say that, in disregarding the polls from the seven precincts of Lee, they *rejected* them. These polls had already, in the eye of the law, been rejected by those whose duty it was to know their correctness. If by *rejecting* (as it is called) an uncertified poll, the assembled sheriffs decided on its validity [*invalidity qu?*] would they not more strongly decide on its validity by *receiving* it? Undeniably—and then the argument proves too much—for it proves that they could neither *reject* nor *receive*.

But in truth, neither reception nor rejection infer any decision or validity, in the sense in which the term is here implied; and the error into which the Attorney General, it is humbly conceived, has fallen, results from confounding validity with authenticity—terms essentially distinct. A record grant or other instrument, may be valid, but unauthenticated; or, as perhaps is the commission before us—may be authentic, yet not valid. The question of authenticity is always, of necessity, presented to the returning officers; the question of validity never. That belongs, by express statute, and exclusively, to a different class of officers—those who *conduct* the election—while the only functions conferred on the *returning officers*, are those of comparing the polls lawfully before them, striking off illegal votes, and ascertaining, declaring, and *deciding* who is the person elected. THEY have no no more power to receive an unauthentic poll than to reject one legally authenticated.

Further to justify this censure, the Attorney General says:

“Nor was there, in my opinion, any power vested in the sheriffs to reject the polls, which the sheriff of Lee carried with him to their place of meeting. *By carrying* them he *recognized* them as polls which must have been *delivered* to him by the

conducting officers at the precincts. See ch. 7, § 9; ch. 8, § 3, of the Code of Virginia.”

And again :

“It is true, that if there were no evidence, either on the face of the poll-book, or *aliunde*, to satisfy the conducting officers at the Court House, that it is a poll, legally taken, *he may disregard it*.

“I think, therefore, that the sheriffs there assembled could not disregard the polls from the precincts of Lee county, *because the sheriff of that county authenticated them by their production*, and *he* had no sufficient ground to have rejected them.”

These arguments hardly require refutation.

Is it not most extraordinary that the power to “disregard” an uncertified poll, which is denied to the sheriffs in full assembly upon the plea that in so doing they would usurp the ungranted power of deciding on its validity, should be gratuitously ascribed to the single sheriff at the Court House, whose humble function it is to receive and carry the polls to their place of meeting? He, one of the conductors, and one also of the returning officers, acting now as a mere carrier, constituted an intermediary judge between these two classes to revise and reverse the acts of the former, and to intercept and control the actions of the latter—nay, of the Governor himself, if there be any limit to Executive supremacy—by rendering authentic and valid what he *carries* and *produces*, and unauthentic what he chooses to “disregard” and suppress. With power to disregard or ratify as there may or may not be evidence, either *adduced or to be obtained*—“*on the face of the poll-book, or aliunde*, to SATISFY HIM, that it is a poll legally taken. And the assembled sheriffs whose province is usurped, and whose functions are thus superseded, are to be reprimanded and punished, because instead of relying on the acts of those whose official certificates are required by law as the means—the sole means—of affording them authentic information, they did not resort to the supposed opinion and *implied* authentication of one having no authority to authenticate—implied from the fact that the poll was *carried* by him to the place of meeting, and the supposed fact that it must have been *recognized by him* as a poll *delivered* to him by the conductors.

But they should have known, it seems, that certificates to the correctness of the polls were mere *matters of form*. *The law requiring them*, says the Attorney General, “must be as it has ever been, construed as *directory*, but *not essential* to the validity of the poll.”

The returning officers had little knowledge probably of the refined distinction between the terms *directory* and *essential*, as

applied to the commands of the law; nor of their authority on that ground to dispense with the performance of a duty imposed on the conductors under a heavy penalty, and the sanction of an oath.

But these are by no means the only grounds relied on to prove the misconduct of the "ministerial" by the "Executive" officers.

The *form* and *caption* of the polls, the *opinion* of the sheriff who *carried* them, founded on the fact that the conductors and commissioners were *sworn*, nay, the *certificate of the magistrate* to their affidavits, are gravely relied upon as the *strongest evidence* of the legality of polls, which the conducting officers failed to certify, and the returning officers declined for that reason to respect! The Attorney General, in order to eke out the legality of the polls, is driven to rely on the *presumption*, that the conducting officers were sworn to do their duty—and, therefore, must be presumed to have done it—forgetting that he had himself charged them with a neglect or failure of duty, in omitting to certify: from which charge this legal presumption ought to have protected them. There is great facility manifested in this application of the doctrine of presumption.

And is it not putting the case quite too strongly to say, that upon the returns of the sheriffs, with the facts stated by the majority, and the poll-books themselves, there was *no ground* to declare Mr. Stras elected? The Attorney General, will himself on further reflection admit, that the want of the certificate required by law to certain polls—which polls were indispensable to the election of Mr. Fulkerson, was *some ground* at least if not a conclusive one, for returning his opponent, who had the majority of legal votes duly certified in his favor.

But *the clerk*, it seems, has sworn that the votes were fairly taken. For aught that appears, the objection to certify the polls might have been founded on the error or fraud of the clerk himself. But supposing his conduct unexceptionable—and there is no ground for the slightest suspicion that it was otherwise—he had no more power to authenticate the polls than *the sheriff* who *carried* them, or the *magistrates* who *certified their affidavit*.

Besides the objections just examined, the return is assailed on various other grounds.

ALLEGED ILLEGALITY OF THE RETURN.

At the very threshold an assertion is made, and a doubt suggested, which, if well founded, shows that there is indeed

no title in either Mr. Fulkerson or Mr. Stras. The passage is as follows :

"The return is *not* given to Mr. Stras according to law. I doubt very much, if a majority of the sheriffs can give the return, under the circumstances of this case."

The rule laid down for the construction of statutes, (Code c. 16, § 17,) that authority given to three or more public officers is given to a majority unless otherwise expressly declared, would seem sufficient to remove this doubt; but if not; if the return of the majority does not justify a commission, clearly none can be founded on that of a minority.

And let it be that the return is *not according to law*; must not the blow which would prostrate it strike down the sole prop, frail as it is, on which the authority of the executive to issue any commission whatever can be supported? It might possibly be argued, with some plausibility, that a return merely voidable for error of judgment, would put the governor in possession of the case, and that having it properly before him, he might grant a commission in accordance with his own views of the law and the facts. But if void for want of authority, it is as *no return*; if no return, no election—for a return is an essential ingredient to constitute a complete election—if no election, no commission; for, as the attorney general says: "*The commission is the result of the election*"—the election the ground of the commission." To commission in such case is to elect.

FACTS AGREED; ALLEGED UNCERTAINTY OF THE RETURN.

Again, it is said, "The facts are agreed by all the sheriffs, that Mr. Stras is elected only by rejecting a large number of legal voters, who, if counted, would give the election to Mr. Fulkerson."

This supposed agreement is the ground apparently of an objection to the return as being *uncertain and double*." "The return," it is said, "when it is certain is only *prima facie*." "Where it is *uncertain and double*, it includes a power to decide upon the facts stated," &c. It is afterwards spoken of as "*the uncertain return*." I do not understand that the sheriffs undertook the idle labor of deciding on the *legality* of the votes alluded to; in law phrase, of *purging* the polls they had rejected. Where polls are rejected, the votes of course go with them; and the question of legality is settled as to both. They are identified; both, therefore, defunct; and a higher power alone can raise them from the dead. All that the sheriffs say is, that IF these votes are to be counted, Mr.

Fulkerson is elected, BUT that thinking them not legally certified, they had rejected them. Your *if* and your *but* are serious obstacles in the way of a desired conclusion. In the present instance, they convert the "facts agreed" into a mere hypothesis, which being adopted, would entitle Mr. Fulkerson to the return, but which the majority positively *reject*, and as a consequence as positively and unequivocally *give the return to Mr. Stras*. There is neither *doubleness* nor *uncertainty* in it.

Thus it is that the official certificate of the returning officers meets us at every turn. If void, no commission can be founded upon it; if valid, the commission belongs to Mr. Stras. The attorney general, however, seems to think, that by annulling the return a way is paved for the independent action of the executive. Hence the incessant attempts to batter it down.

RIGHTS OF MR. FULKERSON AND THE CIRCUIT.

Passing this; he is of opinion, that "*upon the FACTS CERTIFIED by the Sheriffs favorable to Mr. Stras, it cannot be said that he is elected by the voters of the Circuit.*" Not directly affirming the election of Mr. Fulkerson, he yet intimates very strongly that he (Mr. F.) "*has a right to the commission, and they (the voters) a right to him as their Judge.*"

If this were so—if a commission in conformity with the return, could not be issued without depriving both Mr. Fulkerson and the Circuit of their just rights, it would only afford another instance of that "imperfection of all human institutions in ascertaining rights," deplored by the attorney general, as possibly compelling the governor in this case, to refer the election again to the people." But the responsibility would rest on our law-makers, and not on the executive. Nor would the injustice, perhaps, be without remedy, or of long duration. There is another department of the government where rights, public and private, may be ascertained and enforced, and in a manner far more congenial with our institutions. Not now having access to the books, I will hazard no positive opinion; though under the strongest impression, that the courts of justice, clothed with power to annul the most solemn instruments, (judgments, for instance, or even grants in the name of the commonwealth, and attested by the governor,) might, on a *quo warranto*, set aside the return, if founded in error or misconduct; and even if Mr. Fulkerson could not then under a *mandamus*, or without one, be commissioned by the governor, that the return being judi-

cially avoided, a new election might be ordered, and justice thus insured, through the *regular channels*, both to the people of the Circuit and the Judge they might prefer.

I will do the attorney general the justice to say that he nowhere directly affirms the *legality* of the election of Mr. Fulkerson. He attempts, however, to prove it. The argument is ingenious—the premises, as far as he can go, exceedingly imposing. *Judges for the circuits must be elected by the voters thereof. The election is the ground of the commission—conversely; the commission is the result of the election. An election has been duly held in the seventeenth judicial circuit.*

Now, if it could be affirmed as a sound legal proposition, that *Mr. Fulkerson was then and there duly elected*, the conclusion would be undeniable that he is entitled to his commission. But that is the point in dispute. It cannot, therefore, be assumed; nor is it proved, even to the satisfaction of the attorney-general himself. He had come to a decided conclusion that the governor “was not bound, nor had a right, to commission Mr. Stras.” Had he been convinced of the lawful election of Mr. Fulkerson, the advice doubtless, would have been as decided to give him (Mr. F.) the commission. Instead of this, with marked hesitation and commendable candor, he presents an alternative, either way doubtful, and leaves it to the governor to decide for himself. After deciding against the title of Mr. Stras, he propounds this enquiry: “*But can he commission Mr. Fulkerson? or order a new election?*” And thus responds:

“*If, upon the proofs as to the rejected polls in Lee county, either by certificates of the commissioners, conductors, or others, the governor shall be satisfied, or without further proof, is satisfied, that those polls represent a part of the legally expressed voice of the voters of the circuit, then upon the agreed facts, certified by all the sheriffs, he will be authorised to commission Mr. Fulkerson.*

If, however, the governor shall be unable to satisfy himself that either gentleman has been elected, he may be compelled to refer the election to the people again, upon the ground that, owing to the imperfections of all human institutions, the right cannot be ascertained.”

The governor did not find it necessary to require the evidence “*OF OTHERS,*” or call for “*further proof!*” He had no doubts. He affirms, unhesitatingly, that the votes on the uncertified polls “*were votes legally taken of legal voters,*” and that there was “*sufficient evidence on the face of the certificates and polls to SATISFY him that a majority of legal voters did vote for Mr. Fulkerson, and that he was duly elected judge for the*

seventeenth circuit." He, accordingly, gave Mr. Fulkerson the commission.

It is needless to remark again on the "evidence," as it is called, referred to in support of this executive judgment, viz: *the face of the certificates and polls*; a meagre selection from a mass of circumstantial proofs, light as air.

Upon the whole, if the official return declaring Mr. Stras elected be, as it confessedly is, *prima facie* good, his title to a commission "under the constitution and the laws of the state" was complete when the matter was submitted to the executive; and there is an end of the argument, unless the governor had *legal and sufficient cause, and competent authority* to set the return aside.

Both these propositions are affirmed by the attorney general, with the concurrence of the governor.

CAUSE TO SET ASIDE THE RETURN.

Numerous causes, as we have seen, have been assigned. The most material have been just reviewed. They may be summed up in a breath: *the paper appended to the return containing the facts agreed; the face of the certificates and polls; other circumstantial proofs, such as the supposed opinion of the Sheriff at Lee Court-house who carried the polls—the affidavits of the conductors, clerk, &c.—the certificates of justices that those officers took the oaths required by law, &c.* I will not repeat the argument already offered to show the utter insufficiency of these *causes* assigned for annulling the return. Were they, and such as they, numberless as the sands of Araby, they could make nothing stronger than columns of sand.

I pass to the second and momentous enquiry.

HAS THE GOVERNOR AUTHORITY TO DECIDE CONTESTED JUDICIAL ELECTIONS?

First ground—Facts agreed.

Throughout the official opinion great stress has been laid upon what are termed "*the facts agreed.*" The use made of them in other instances has been previously adverted to. They seem now to be regarded as in some way authorizing the governor to exercise the power not given by "special statute," of deciding this case of doubtful or disputed judicial election. They are in this connexion apparently thus referred to by the attorney-general:

“But even if they [the sheriffs] can [give the return] they have *given it, subject to the law upon the facts agreed*, and it must be taken *in that way*; and, *if so*, as I have indicated, the law is against Mr. Stras’ claim to the office.”

Now, the title of Mr. Stras being put aside, authority is thereupon assumed to be vested in the governor to commission Mr. Fulkerson. Does the attorney general mean to say that the power of the executive to do this, results from the return being given, as he supposes, *subject to the law upon the facts agreed*? He says it (the return) “*must be taken in that way*,” that is, as I understand, as submitting the law on what is technically called *a case agreed* to the final determination of the governor. If so, the proposition is replete with error.

The return, it is surely needless to say, is *no case agreed*, nor submits to the executive any question whatever of law or fact. Were it so; the rights involved are those of Mr. Stras and Mr. Fulkerson; of the voters of the circuit; of the whole people of Virginia. Parties may submit their own rights on a case agreed; juries may find certain facts, and submit the law arising upon them to the judge whose function it is to decide; but what authority had the sheriffs to submit the rights of the parties and of the public to the governor? Or what right to transfer to him their own power and duty? That power and duty were delegated to them, and none can delegate delegated trusts confided *specially* to themselves.

Nor could the governor *receive* any authority delegated by the seven sheriffs of Lee—no more than *they* could receive, or he confer upon *them* his delegated trust of granting commissions. Executive and ministerial officers must deduce their authority from a higher source, than from each other.

THE REGULATION OF CONTESTED JUDICIAL ELECTIONS.—A CASUS OMISSUS.

A frank avowal is made both by the governor and the attorney-general, of the want of any special provision conferring the power, as the governor terms it, of “regulating contested elections”: on either of the departments of the government. This high prerogative is claimed for the executive solely by IMPLICATION.

Both the convention and the general assembly have omitted to provide for what should have been readily foreseen, and the executive, with an earnest, but over hasty zeal, *ne quid respublica detrementi capiat*, has transcended the limits of its

own authority. The result is, that we have a judge of whose title the first law officer of the state seems evidently dubious; a judge, who, however true it may be that *in point of fact* he may have received a majority of legal votes, must be regarded, legally speaking, as seated on the bench, not in accordance with the law of the land, but by the edict of a co-ordinate department; not as the people's judge, but the governor's.

The clauses of the constitution relied upon to sustain the power of the executive to supervise and decide contested elections to the bench, are

First. *The general power to attest and issue commissions.*

Second. *To take care that the laws be faithfully executed.*

POWER TO COMMISSION.

The power to attest and issue commissions, like that to attest and issue grants, seems purely ministerial. Certain preliminary acts being duly performed and certified, by those authorised to perform them, the commonwealth's commission, attested by the governor, is a matter of course, demandable *ex debito justitiæ*.

But this function of attestation, intended to give effect to previous acts of other officers, is now regarded as a high appellate power to supervise, affirm or reverse at discretion all such previous acts; and the first inference drawn from this view of it, is an implied authority to nullify an official return, though, *prima facie*, good and lawful.

After assailing the return in the case before us, on the alleged ground of uncertainty, the attorney general adds:

"The power to commission includes the power to *pass upon* the validity of a *certain return*."

Thus, it seems the nullifying authority is the same over a certain and an uncertain return—the latter being void, of course, for uncertainty, and the former for *invalidity*; invalidity indefinitely; of which the governor is the sole judge: *judge* in the proper sense of the term; for he is not merely to see that the proceedings have been conducted in due form, but, moreover, according to the official opinion, upon the evidence, either on the face of the proceedings, or, as the lawyers say, *dehors* the record, to *pass upon* and decide the whole merits of the controversy. *Why* such powers should be implied from this ministerial duty, we are not informed. But the attorney general says it is so; and such we are bound to believe it. Grant, then, that the governor may, at his will and pleasure, annul all official returns whatever, certain

or uncertain, void or valid, say the return here is lawfully rescinded; one impediment removed, one stride taken towards *absolute power* over judicial elections; say that the person officially declared to have been elected has been legally set aside; that the vacancy, consequently, still exists; the question now is *where is the authority found to fill it by commissioning a person having no lawful return?* There was none; confessedly, neither law nor precedent; the governor made both. This same "power to commission," just commuted into a power to *annul*, is now converted into a power to *elect*, and thus the *casus omissus* is miraculously provided for.

It is a *fact*, we are gravely told, that *the constitution provides for a contested election in case of a governor; but makes no provision for any other case; while it gives to him power to grant commissions to all other officers.* It is also a *fact* that *the (statute) law provides for a contested election in case of a justice, &c., before a court; but makes no provision for the case of a judge.*

These facts being added together, and mixed up with the further facts, that *the governor is sworn* "to take care that the laws be faithfully executed," and to support the Constitution," prove, by some mysterious process, that the framers of the Constitution and laws, intended to confer on the governor the function of supervising and deciding contested judicial elections!!

In none of the instances cited, in which this supervising power is given, is the executive once mentioned. Yet in all cases not specially given to the other departments, he comes in under a new interpretation of our political testament, as favored heir or residuary legatee of this, and as clearly, of all ungranted power.

If the function of supervising and deciding be a consequence of the power to commission, the principle applies to all elections of officers acting under commissions; because the power of commissioning extends to all such cases. In the cases, for example, of justices of the peace, sheriffs, &c.

Grants and commissions stand in the same category. Both emanate from the Commonwealth, and must be attested by the governor. Why should he not, as incidental to this power also, exercise the function of supervising and deciding? And if, upon the face of the proceedings, or on certificates of surveyors, chain carriers, or *others*, he should be *satisfied*, or *without further proof*, was satisfied, that there was a mistake or flaw in the title of the party obtaining the register's endorsement, set that endorsement aside, and order a grant to be issued to the contestant?

It may be said, these investigations are entrusted to the courts. True, but when the courts decide, the governor's power to grant commissions attaches, and should bring with it the functions of *supervising and deciding*. If the incidental power of the governor be paramount to the express power of decision given to the sheriffs, why not to that also entrusted to the courts?

But did it not occur to the attorney general and the governor, that the grant of this function of final revision in the cases just mentioned—those of contested elections of justices, &c., and cases of contested grants—is itself a convincing argument against the claim asserted in the case before us? If in this case the governor be the proper functionary to decide in the last resort, *why not* also in the cases just enumerated? If the final decision was not confided to the executive in relation to *justices* and *ministerial officers*, what reason is there to suppose that the delicate trust would have been conferred on that department of controlling and ultimately deciding contested elections of judges of the higher courts. How inconsistent is such a claim with the equality and independence of a co-ordinate department, and with the symmetry of our system.

I am not aware of any instance in which the executive is authorized to decide contested elections, except in cases of militia officers. These officers belong properly to the executive department: the governor is their head. Upon the same principle contested elections of members of the general assembly are finally decided by *the house of delegates* and *senate* respectively; and in like manner, as already said, those of justices, sheriffs, &c., by *the courts*; thus symmetrically assigning to each of the departments the supervising power over contested elections of officers belonging to or connected with it: *referendo singula singulis*.

Why then, upon reason or analogy, are we to guess—for it is nothing more at best—that contested elections of the highest judicial officers in the state were designed to be brought under the control of another department—above all, under that of the commander-in-chief of the army and navy?

It was formerly regarded as a sound rule for the interpretation of statutes, grants, &c., that the specification of one or more particulars was an implied exclusion of others. *Now*, it seems, in expounding the fundamental law, it is held that the grant of a specific power to *issue commissions*, is the grant of a different power to *supervise and decide the election*; more than that, the power expressly given in the case of a contested election of governor to the *general assembly*, and those

of justices, &c., to *the judiciary*, is supposed to imply the grant of a similar power to the *executive in all other cases*. Further still, *the very omission* to give a specific power, is proof conclusive of *the intention to give it*; so conclusive as to admit of *no other* explanation.

"Can *these omissions* in the constitution and laws," the attorney general asks, "be *otherwise* explained, than by attributing to the framers of both an intention to give to *the power to commission*, (i. e. the governor,) the function of *super-
vising and deciding*," &c.

Very fortunate is it, indeed, that our lawgivers have found gentlemen of such acknowledged ability to interpret the meaning of their omissions. It is not always easy to explain what men mean by what they say; but it is a triumph indeed, to pronounce what numerous and distinct bodies of men intend, when they say nothing.

The old rule too, which holds that legislators, as well as private individuals, are to be presumed to intend the necessary or probable consequences of their own acts or omissions, is of course exploded. Were we at liberty to apply it, we might say that both the convention and the legislature, if they had any intention in the matter, intended that contested elections in the case of judges, should be settled by the courts of justice, the proper forum for the settlement of all controversies between man and man, public or private, not specially committed to some other: but if not admitting of a settlement there, no recourse being given to any other department, and the vacancy consequently continuing, the obvious consequences might well have been intended, that a new election should be had to fill it. In corroboration of this view, I may here remark, that such new election was one of the alternatives recommended by the attorney general to the governor in this very case.

But suppose the claim, by implication, to the power in question, is not intended to be asserted, as is very probable, in reference to contested grants, or contested elections of justices, &c., but only to cases wholly unprovided for—then it extends to the offices of attorney general and lieutenant governor, to the board of public works—to all the judges of the five sections, and the twenty-one circuits. Yes—the supreme appellate court of the state is to receive its members, not in conformity with the certificate of officers specially entrusted on oath to conduct the election, and compare the polls, but in conformity with the final decision of the governor, founded on evidence which he may call for, or receive in his office or his chamber; furnished by either or neither of

the contesting parties—the evidence not of the conducting officers only, but of OTHERS.

It is in vain that we are invited to search the law and the constitution for executive authority to “supervise and decide” controverted judicial elections. None is to be found in either, direct or implied. The governor himself rests his intervention on an explicit concession that no express authority exists; and the nearest approach to his justification for assuming it, is a most improbable conjecture, that *had it been conferred* on any department, *it would have been on the executive.*

We have seen that the attempt to deduce this power of supervision from the “power to commission,” cannot avail; that this power to commission is essentially executive or ministerial, while that to supervise and decide, as claimed, is as demonstrably judicial; that by the admission of the attorney general, the governor can commission none who are not “entitled to commissions under the constitution and the law;” that whatever authority may exist in a court, or in either house of the general assembly, no examination can be made by the governor into the merits of a contested election, nor the power lawfully exercised by him of commissioning *ex mero motu*, any person as a judge against or without a legal return.

We may dismiss this branch of the subject with one further remark. If it be meant to affirm that because the governor has the power to commission, every commission granted by him is *ipso facto* valid, the consequence would follow that a commission to one having no shadow of title, would be as valid as to one duly elected; to John Smith, for example, as to Mr. Stras or to Mr. Fulkerson. If that be not meant, then the question whether Mr. Fulkerson was or was “not entitled under the constitution and the law,” is in no manner concluded or affected by the grant of a commission.

As unavailing is the effort to deduce the power of “supervision” from

THE DUTY IMPOSED UPON THE GOVERNOR “TO TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED” AND “TO SUPPORT THE CONSTITUTION.”

The oath to support the constitution is not referred to, I presume, as importing a substantive grant of power. Could it be so construed the power would be divided among too many participants to make it of much value. It is rather a

restriction than a power; at least was so intended. Let that pass.

In *taking care that the laws be faithfully executed*, the first duty of a governor of Virginia is, to take especial care that he does not violate the law himself, by assuming powers never conferred upon him.

The injunction introduced for the first time in the constitution of 1830 is, as its terms import, purely conservative. Before acting under it, the governor must ascertain that *SOME VIOLATION of law has been committed, or is meditated; that the case is one properly, if not exclusively of executive cognizance; and the proceedings adopted, and the remedy to be applied, strictly executive in their character.*

Utterly unwarranted is the supposition that the framers of the constitution or laws ever intended by the general clause in question, to confer on the executive the special authority now claimed under it.

No governor—no citizen of Virginia—let us hope, will ever forget that the general power now invoked, and, with but few exceptions, all others granted by the constitution and the laws, are held in subordination to the great principle which confines to separate departments the different powers of government; a principle proclaimed in our first bill of rights and constitution, and reiterated in every revision of both these sacred instruments down to the present day:

“The legislative, executive and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to either of the others.”

To apply the principles now stated, to the matter before us—

1. *What law has been violated?*

We shall be answered, the law concerning judicial elections.

This charge has been fully considered already; then—

2. *What were the proceedings adopted by the executive and the remedy applied?* A summary trial, or rather judgment, whereby the conduct of the ministerial officers was censured; the official acts, opinions and decision of the majority of the returning officers reversed; and a commission issued to a person having no return, as though duly elected and returned.

The very first step, to acquire jurisdiction, is in effect an executive enactment to supply a *legislative* omission. The next is to exert it by an executive trial and judgment, in a controversy involving not only a right to office, but it may be, questions of reputation, or charges even of criminal misconduct; questions peculiarly, exclusively *judicial*. The last is to *execute* his own judgment. Thus is the constitution *doubly* viola-

ted, by the exercise substantially of both legislative and judicial powers; and a concentration effected in a single hand of the power of all the departments—those powers whose union is the true definition of despotism.

But it will be said, what has been done was done under a high sense of public duty to subserve the interests of the people, and in obedience to their voice? *It would be monstrous*, the attorney general thinks, *to set aside the voice of the people*, because a public officer may have failed to do his duty.

The governor expresses himself much to the same effect, but in a manner somewhat more qualified.

It is impossible to doubt the sincerity of the opinions either of the governor or the attorney general. It was their firm conviction—and there is every reason to suppose it was *in point of fact* a correct one—that Mr. Fulkerson received a majority of legal votes; and their leading desire was, as it would have been that of every honest heart, that justice should not be defeated by what *THEY regarded* as unessential forms. The high moral tone of their sentiments almost reconciles us to what I must think dangerous political errors. *Fiat justitia ruat cælum*. Let justice be done, though the constitution fall. I do not give this as their sentiment, or as the result they would intentionally accomplish. Far from it: but firmly am I persuaded that the downfall of the constitution is the unavoidable consequence of the opinions they advance.

It is true, beyond doubt, as the governor tells us, that an election was legally held; more than probable as just said, that the gentleman commissioned by him *in point of fact*, received a majority of legal votes; and strictly just that the voters should not be deprived of their rights. Granting all this, several links seem wanting to complete the chain of his argument. There are three propositions to be sustained before we can come to the conclusion that the commission he awarded was valid; or that the voters might not have obtained their rights, without an assumption by him of ungranted authority.

1st. It must be shown that he had authority to set aside an official return, such as that of the majority in this case.

2nd. That if he had such authority, he could go behind the return, or receive or examine any *other evidence* than such as the statute prescribes to show the *correctness* of the polls—namely: *the official certificates of the conducting officers*; and

3rd. That granting all this, there was a shadow of authority in him to issue a commission to any person *whatever not having a lawful return*.

His proposition may be entirely correct, that the votes of the people given at the time and place, and in the manner prescribed by law, should not be nullified by failure of duty of either ministerial or executive officers. But it does not follow, from holding both the governor and the returning officers bound to conform to the legally certified polls, and the former moreover to the legally certified returns, that the failure of any officer, executive or ministerial, to do his duty would deprive the person justly entitled to the office, or the people who elected him, of their just rights. It is a maxim of law, that there is no right without a remedy. But the executive is not the only department of government where justice may be obtained. The governor is not the state. There is another department, called the judiciary, which, in general, is found quite competent to render justice in all manner of controversies between man and man. There was not the least occasion to invoke the omnipotent power of the governor. The true question is not whether the rights of the people, or of Mr. Fulkerson, shall be nullified, but whether, "in the absence of special statute," redress should be sought from tribunals established long before the foundation of our commonwealth, for deciding disputed questions of law and fact, or in a new *forum*, never endowed with such authority—in the halls of justice, or in the executive chamber. Let justice be done. The law and the constitution, I doubt not, have made ample provision; but if not, let them be amended; not trampled under foot by those *whose sworn duty it is to take care of the faithful execution* of the one, and to support the other.

It is obvious that the governor and attorney general regard the official return, the omitted certificates of the conducting officers, the total omission of the law to confer any special authority whatever to "supervise or decide" the contested election in question; in a word, all the requirements of the law which stand in their way, as mere matters of form. The attorney general had told us before, that the requirement of certificates to the correctness of the polls, had always been construed as *directory*, and not essential; that "it was never designed to defeat the *popular will* by a deficiency in *formalities* which the law *only* prescribed to secure its full and free expression." Where this universal construction has prevailed, we are not told. Nothing is more probable than that *wherever jurisdiction* is given to settle contested elections, the want of a certificate to a poll, would not bar an inquiry into the legality of the votes recorded. A court of justice may have power to disregard official acts or omissions, to require the

proper officers to amend their returns, or may set aside an unjust return, vacate a commission unlawfully granted, and render judgment in favor of one not appearing *prima facie* entitled. This ultimate decision, according to the right of the case, is the very object for which the power is given.

There can be no right, in a legal or constitutional sense, against the constitution. The constitution in that sense can do no wrong; and no act, however well-intended, effected by its violation, will, I trust, ever be sanctioned by the free people of the Old Dominion. The constitution emanates from them. It is the exponent of their sovereign will; and all of us, especially those who have *sworn to support it*, should bow to *its supremacy*. The constitution must not be violated that good may come of it.

The proposed enquiry into the true character of the commission issued to Mr. Fulkerson is now concluded.

But you may ask, *cui bono*, Why disturb or question a decision in which the people most directly interested, indeed, the whole State apparently acquiesce? The motives of the governor were patriotic; the results beneficial.

I reply: To vindicate the constitution—to meet at the threshold a bad precedent, and dangerous doctrines.

It is this very acquiescence, these good motives and beneficent results, the exalted talents and patriotism, and overwhelming influence of those whose official opinions and acts are in question, which have mainly impelled me to engage in a task likely to prove profitless. There is no exercise of illegal power so dangerous to the liberties of a people, as that upon the plea of the public good. Of precedents equally bad, it may be taken for a rule, the better the motive, avowed or ascribed, the worse the precedent: worst of all, are those set by the best men from the purest motives.

Quieta non movere, is often a sound and prudential maxim, not *always*. It is that which all history teaches, has made despotism and its calamities of “so long life.” It was not the maxim of our fathers. A penny a pound on tea was not of itself a tax so greivous as to warrant the cost of a corporal’s guard, or the blood of a single soldier: but acquiescence in it would have yielded a vital principle. It was resisted by a seven years’ war.

Whatever may be the opinion of those to whom the ultimate decision of the question belongs, all will agree, that the law of judicial elections stands in need of early amendment.

SHERIFFS' RETURNS.—NOTICES UPON.

In the District Court of Appeals of Virginia, for the Ninth Judicial District. Present Judges Lee, President, Camden and Thompson, held at Parkersburg, Virginia, December Term, 1857.

The 40th section of Chap. 49 of the Code of Virginia, construed not to apply to cases in which an execution in the hands of the sheriff against parties known to be perfectly solvent is returned, "money not made."*

In such case, the notice authorized by said section does not apply and the sheriff and his sureties are not bound, though they would have been under § 48† of Chap. 134. 1 Rev. Code, p. 542.

In this case the plaintiff Fisher gave notice to the sheriff of Wirt county and his sureties, that he would move the circuit court of said county, for judgment against them for the sum of \$79 83, with interest on \$76 16, part thereof, at the rate of fifteen *per centum per annum*, from the 3d July, 1854, and costs. The facts upon which the notice was based were these—

On the 15th of May, 1854, the plaintiff Fisher sued out of the clerk's office of the circuit court of Wirt county, a *fi. fa.* in his favor, as assignee of S. S. Coe, against W. P. R. Butcher and E. C. Hopkins, for \$147 18, and the costs, amounting to \$3 67; execution endorsed, to be discharged by payment of \$73 59, with interest from 2nd Dec., 1853, till paid, and costs, directed to sheriff of Wirt county, returnable to July Rules, 1854. On May 22nd, 1854, execution went into the hands of A. Peck, for the sheriff of Wirt, who, on the 25th Dec'r, 1854, returned the same, "Money not made." On the trial of the motion, the plaintiff proved that Cain, one of the defendants, was sheriff of Wirt county, and the other defendants his sureties in his official bond, and that Peck was his deputy. He also proved demand, made by himself of the sheriff, of the money mentioned in the execution, after the return was made; that all the defendants named in the execution lived, in 1854, at Wirt court-house, and that

*" If any officer or his deputy shall make such return upon any order warrant, or process, as entitles any person to recover money from such officer by action, the court to which, or to the clerk's office of which, such return is made, may on a motion in behalf of such person, give judgment against such officer and his securities and against his and their personal representatives, for so much principal and interest as would, at the time such return ought to have been made, be recoverable by such action, with interest thereon, at the rate of fifteen *per centum, per annum* from that time until payment.

†§ 49, p. 542. 1 Rev. Code.

one of them became sheriff of Wirt county, on the 1st July, 1854, and that all of them were solvent, and that the money could have been made out of the property of defendants in the summer of 1854.

The court below gave judgment for defendants, and an appeal was taken by plaintiff to this court.

CAMDEN J. delivered the opinion of the court.

The appellant caused a notice to be served on the appellees, that on the first day of the Spring term, 1855, of the Circuit court of Wirt county, he would move the said court for judgment against them for the sum of \$79 83, with interest on \$76 16, part thereof, at the rate of 15 per centum per annum from the 3rd day of July, 1854, till paid, and the costs of the motion; for that, as he alleged, on the 15th day of May, 1854, he had sued out of the clerk's office of said court, upon a judgment therein rendered, a writ of *feri facias* in his name, as assignee of Selden S. Coe, against the goods and chattels of Wm. Parrill, R. Butcher, and E. C. Hopkins, for the sum of \$147 18, and the costs, amounting to \$3 67, which execution was endorsed, to be discharged by the payment of \$73 59½ cents, with interest thereon from the 2nd day of December, 1853, until paid, and the costs aforesaid, and was directed to the sheriff of Wirt county, and made returnable to the 1st Monday in July, 1854, at which time interest had accrued thereon to the sum of \$2 57, making, at the return day thereof, of debt and interest, the sum of \$76 16, which execution, on the 22d day of May, 1854, went into the hands of A. Peck, a deputy of the said Cain, who, on the 25th day of December, 1854, returned the same to the said clerk's office, with an endorsement thereon, "money not made, December 25th, 1854;" that said return entitled the appellant to recover, by action, from the appellees the money mentioned in said execution, which, on the 25th day of December, 1854, had been demanded by the appellant of the said Peck, deputy of the said Cain, sheriff as aforesaid, who had failed to pay it over. On the day mentioned in the notice, it was returned, and the motion was docketed in the said court, and was continued until the 3rd day of October, 1856, when the death of the defendant George W. Dobson was suggested, and the motion as to him abated. The other defendants were called, but failed to appear. The appellant offered evidence to the court establishing the matters alleged in his notice. And thereupon the court, considering the return of the sheriff upon the said execution as not authoris-

ing a judgment in favor of the appellant, dismissed the said motion. And the appellant excepted to the opinion of the court, and by bill of exceptions had the facts proven upon the hearing of the motion spread upon the record, to which judgment a supersedeas was awarded by a judge of this court. The attorney for the appellees contends that the amount in controversy is not sufficient to give this court jurisdiction to review the judgment of the said circuit court, and that if it has jurisdiction the judgment is right and ought to be affirmed. Both questions were ably argued by the counsel of the parties. I shall first consider the question of jurisdiction. Had the appellant been entitled to a judgment for the amount of the execution mentioned in his notice, his recovery would have exceeded \$100 besides costs, so that this court has jurisdiction. See *Stratton v. Mutual Assurance Society*, 6 Ran., 22.

It therefore becomes necessary to consider the other question raised in the argument, Whether the judgment of the circuit court was right or not? I have encountered difficulties in forming a satisfactory opinion upon the question, depending, as it does, upon the construction of the 40th section of chap. 49 of the Code of 1849, which provides that, "If any officer or his deputy shall make such return upon any order, warrant or process, as entitles any person to *recover money from such officer by action*, the court to which, or to the clerk's office of which, such return is made may, on a motion on behalf of such person, give judgment against such officer and his securities, and against his and their personal representatives, for as much principal and interest as would, at the time such return ought to have been made, be recoverable by such action, with interest thereon at the rate of fifteen per centum per annum from that time until payment." It was contended in argument that this section was intended to take the place of the 48th section, in vol. 1 of the Code of 1819, page 542, and to subject sheriffs and other officers, upon their returns, to the same liabilities that that section imposed upon sheriffs. It is evident that it was intended to embrace that subject, but it is also apparent that the legislature intended that it should be so modified as to embrace liabilities incurred by officers not directly provided for by the 48th section, in the act of 1819, such as constables. See vol. 1 Code of 1819, page 253, section 31—Coroners. See same book, page 293, sec. 33—Sergeants. See same book, page 285, sec. 1. But whether it was intended that section 40 of the Code of 1849, before referred to, should subject these officers to the same liabilities that the 48th section of the Code of

1819 imposed upon sheriffs, is the question of difficulty in this case. Said 48th section after providing for the failure of the officer to pay over money received upon executions, &c., declares, that if the sheriff or other officer "*shall make any other return upon any such execution as will show that such sheriff, under sheriff or other officer, hath voluntarily and without authority, omitted to levy the same, or, as would entitle the plaintiff to recover from such sheriff or other officer by action of debt, the debt, damages or costs in such execution mentioned ;*" and upon failure to pay the same over to the creditor, authorises the court to give judgment, upon motion against the officer for the money mentioned in the execution, &c., with interest at the rate of fifteen per centum per annum, from the return day thereof, until the judgment shall be discharged. For the appellant it was argued, that unless there is a clear legislative intention, expressly to the contrary, that it should be presumed that it was intended to retain the provisions of the said 48th section. That view may be correct, but was it retained? We are left without the aid of any adjudicated case, by the court of appeals, arising upon the construction of the said 40th section, and are aided by only a single case (*Stone v. Wilson*, 10 Grat. 529,) in which the provisions of the said 48th section bearing upon the question arising in this case were considered by that court. In that case the sheriff was proceeded against, by motion, upon his return and amended return, on a *capias ad satisfaciendum*, and as a majority of the court (Judges Allen, Daniel and Lee,) were of opinion that the plaintiff was entitled to recover for a voluntary escape, it affords but little aid in arriving at a satisfactory conclusion in this case. Conceding, as contended for by the appellant, that under the provisions of the 48th section of chapter 134 of vol. 1 Code of 1819, the appellees would be liable in this case, the appellant's motion cannot be sustained; for—I am of opinion, that the 40th section of chapter 49 of the Code of 1849, did not re-enact that part of said section 48, so much relied upon by the appellant to support his motion expressed in these words, "*or shall make any other return upon such execution as will show that such sheriff or other officer hath voluntarily and without authority omitted to levy the same.*" It certainly does not retain the clause just referred to in express terms, or terms of similar import, unless it is retained by the following clause in said 40th section: "*Shall make such return upon any order, warrant or process as entitles any person to recover money from such officer by action.*" I am of opinion that this clause was intended to supply the place of the clause in the said 48th section, in these words,

"or as would entitle the plaintiff to recover from such sheriff or other officer by action of debt." To my mind the two clauses are substantially the same, except that the act of 1849 extends its provisions to officers not embraced by the act of 1819. If the act of 1849 retains the clause in the act of 1819 as to voluntary omissions to levy, then that part of the act of 1819 was surplusage, for according to the argument it was embraced by the clause that immediately followed; for I have not been able to discover any material difference in the terms "by action of debt," used in the act of 1819, and "to recover money by action," in the act of 1849. It seems clear to my mind that the clauses in the act of 1819 as to omissions to levy executions, and the one that provides for motions against the officer whose return gives the right to recover by action of debt, create distinct liabilities—the former highly penal in its character, and that it was not the intention of the legislature to retain it by the act of 1849.

The term in the act of 1819, by action of debt, in my opinion, was intended to give to the party the right to recover of the officer when his return showed that he was liable (in the words of the statute) for the debt, damages or costs mentioned in the execution, but not for damages for failing to levy it. Debt or *debitum*, in common parlance, is a sum of money due from one person to another."—Jacob's Law Dictionary, vol. 1, p. 197—and the action lies wherever a sum is fixed and certain, or is capable of being rendered fixed and certain, due from one person to another, whether by contract or legal obligation, but not for unascertained damages for some wrong to the rights or person of another, or of omission of duty towards another, or his rights. The distinction between the recovery of a debt and damages for a wrong or omission of duty is so well understood by the legal profession that it would be a waste of time to refer to authorities to demonstrate it. Various enactments in the Code of 1819, as well as in the Code of 1849, recognize the distinction. I have before said, that the term used in the act of 1849—"to recover money by action"—is substantially the same as the term in the act of 1819—"by action of debt." In Jacob's Law Dictionary, vol. 4, p. 303, where reference is made to Co. Litt. 207, money, *moneta*, is defined to be "that metal, be it gold or silver, which receives authority by the prince's impress to be current; for wax is not a seal without a print, so metal is not money without impression;" but I have found it no where laid down, that unascertained damages are money. When, by law, one individual is entitled to recover money of another, there is a debt due from the one to the other, and in

most cases an action of debt would lie to recover it. The legislature in its effort to abridge the Code of 1849 in most instances when providing for the recovery of debts due to the commonwealth and individuals, uses the term "money" instead of "debt or public dues." To show this, it is only necessary to consult the Code, chs. 42, 167, 185, 186, &c. And whilst I am of opinion that most of the provisions of the Code of 1849, providing for the recovery of money by that term, are to be understood as meaning such liabilities for which the action of debt or assumpsit will lie and not actions sounding in damages; yet however, where the damages are ascertained and judgment rendered, such judgment would be embraced in the term debt or money, for debt will lie on the judgment in such case.

Now what is the appellant entitled to recover in an action against the appellees upon the return of the deputy sheriff, Peck? Damages (not money) for his failure to levy the execution, the amount of which would depend upon circumstances. If the defendants had property out of which the amount of the execution could have been made, and it was lost by the failure of the sheriff to levy upon it, the damages would be much greater than if the defendants remained good, and the debt was or could be made, or the defendants had nothing upon which it could have been levied. I cannot think that the legislature, in enacting the 40th sec. of chap. 49, Code of 1849, by the terms therein employed, intended to pass or retain a law so penal in its character. I am for affirming the judgment.

EQUITABLE JURISDICTION.—DISTRESS.

Preston & Scifer vs. Olinger.

District Court at Abingdon, December 1857.

Equity has no jurisdiction in the case of an excessive distress for rent; or of a distress when no rent is due. The remedy at law is complete.

A bill of injunction is taken for confessed in a case where court has no jurisdiction, and the injunction is perpetuated with costs. The court ought to have dismissed the bill at the hearing; and the appellate court will reverse the decree and dismiss the bill, although there was no appearance, and no plea, answer or demurrer.

Jonathan Olinger presented his bill to the judge of the Circuit court of *Smyth* county, setting forth:

That, on the 15th February, 1852, he leased a farm from *Andrew Scifer* for five years, at the annual rent of \$50; *that* sometime afterwards *Scifer* assigned the lease, and all benefit thereof, to *Thomas L. Preston*; *that* about the 1st January, 1856, *Preston* distrained complainant's effects for \$150, being three years' rent, together with interest; *that Scifer* was indebted to complainant in the sum of \$133 75, and was so indebted before complainant had notice of the assignment to *Preston*, and *that Preston* was also indebted to complainant in the sum of \$25, for work and labor done; *that* complainant's property was advertised for sale, and would be sold. He therefore prayed that *Scifer and Preston* might be made parties defendant, and that *Preston* might be enjoined from enforcing his distress warrant, &c. The injunction was granted.

The defendants never appeared, and made no defence whatsoever. The cause was regularly set for hearing, *pro confesso*. Several depositions were taken by the plaintiff, tending to prove his debts against the defendants. They did not attend the examination of the witnesses, and paid no attention at all to the case. On the hearing the circuit court perpetuated the injunction with costs.

Preston and Scifer obtained a *supersedeas* to this decree.

Wm. H. Cook, for the appellants, submitted,

1st. That there was not a shadow of ground for the interposition of a court of equity. That court had no jurisdiction. The legal defence, and the legal remedy for the injury done were both complete. Sec. 1, chap. 189, p. 720 of the Code, allows the lessee to give a forthcoming bond, and then to defend any action or motion on that bond, upon the very ground set up in the bill, to wit: that no rent is due. And the lessee has a perfect remedy for any injury done him by the distress. Sec. 3, chap. 148, p. 589, gives an action on the case for a mere distress, a simple *seizure*, when no rent is due; and in the same action *additional* damages may be given in case of a *sale* under such distress.

2nd. The bill suggests no reason for failing to take advantage of these ample statutory provisions. It suggests no fraud, no surprise, no ignorance of facts, no necessity for discovery, no inability to prove his case. Had it been alleged that the complainant was unable to give a forthcoming bond, or that the defendants or either of them were insolvent, there might be some room for contest. In the language of Judge BROOKE, in *Mayo v. Winfree*, 2 Leigh, 370, "This is an *action of replevin* in the disguise of a *bill in chancery*."

3rd. On a *demurrer* this bill would have been dismissed for *want of equity*. The only question is whether the Circuit court should not have dismissed the bill on the hearing; and whether we have not a right to insist upon a reversal of the decree, upon the ground that the bill should have been so dismissed. We must look to sec. 19, chap. 171, p. 648 of the Code. Are we concluded by the terms of that section, we having failed to plead to the jurisdiction, or make any other defence in the court below? That section applies only to cases where the bill *on its face* shows *proper matter* for the jurisdiction of the court. Such is not the case here. That section, and the analogous ones preceding it, have often been discussed in our courts. See the cases noted in the margin to that section, and also the following: *Morgan v. Carson*, 7th Leigh, 238; *Hudson v. Kline*, 9 Grat. 379; *Allen v. Hamillon*, *Idem*, 255; *Slack v. Wood*, *Idem*, 40. All these cases show that the section referred to does not authorize a court of equity to take jurisdiction of a case, when the bill on its face shows no matter proper for the jurisdiction; and there are several modes by which, in such event, the cause may be disposed of. The injunction may be dissolved *on motion*, without answer, as in *Slack v. Wood*; on demurrer the bill may be dismissed, or at the hearing relief may be denied and the bill dismissed. The latter course ought to have been adopted here. The injunction could not be *dissolved* before the hearing, except on the appearance and motion of the defendants; but as Chancellor TAYLOR said in *Alderson v. Biggars*, "the application to this court was improper." According to him the objection might be made at the bar on the hearing. See also *Randolph v. Kinney*, 3 Rand., 398, and *Stuart v. Coalter*, 4 Rand., 74.

4th. The case of *Mayo v. Winfree*, in 2 Leigh, before referred to, is precisely like this, except that it was stronger for the lessee, and there relief was denied.

There was no counsel for the appellee.

Per curiam. (ALLEN, P., FULTON, BAILY, HUDSON, and FULKERSON, Judges.)

The court is of opinion that the appellee had a complete remedy at law, and that the circuit court, instead of perpetuating the injunction, ought to have dissolved it at the hearing, and dismissed the bill. Therefore, &c., (decree reversed with costs,) and this court proceeding to render such decree as the circuit court ought to have pronounced, &c. (Bill dismissed with costs.)

WITNESS.—EVIDENCE.

Sexton vs. Crockett.

District Court at Abingdon, December 1857.

A party offers to read the deposition of a witness, on the ground that the witness is more than one hundred miles from the place of trial. It is not necessary to shew that he is more than a hundred miles distant, at the time of the trial. It is sufficient to shew that such was the case at some time prior to the trial: and this shifts the *onus* on the other party, and requires him to shew that the witness has since come within a less distance, and is near enough to attend the trial.

Crockett brought an action of detinue against *Sexton*, in the Circuit Court of Wythe, and the cause was tried on the 25th day of October, 1855, when a verdict was found and judgment rendered in favor of the plaintiff.

On the trial the defendant tendered the following bill of exceptions to the opinion of the court:

"Be it remembered, that on the trial of this cause the defendant, to maintain the issue on his part, offered to read the deposition of *Alex'r R. Newman*, in these words and figures: (here the deposition was set out in full, and appeared to be regularly taken;) but the plaintiff objected to its being read unless the defendant could first show where the witness resided. And thereupon the defendant introduced a witness, *William Rider*, who proved that the witness *Newman* left Wythe county some time since, and went, as he heard, to Winchester in this State, since which time *Rider* has heard nothing of him, or his place of residence. It was proved by *Peter Butner* that about the time the deposition was taken, (which was the 25th June, 1853, more than two years before the trial,) or perhaps some months afterwards, *Newman* left Wythe county, and *Butner* afterwards heard that he was about Winchester. It was proved by *A. T. Newberry*, that in October last, (about a year before the trial) he saw said *Newman* near Winchester; saw him two or three days in New Market—which place and Winchester are both more than 100 miles from Wytheville—that *Newman* told him that he expected to hear from the defendant shortly, and that he expected to return to Wytheville; that *Newman* had some children, among them a married daughter, residing near New Market; that *Newman* is a mechanic, and has no fixed residence that deponent knows of; and none of said witnesses know where said *Newman* now is. It was also proved by *at a spa*. had issued from the clerk's office of this court for said witness, and was returned by the sheriff of Wythe, "no

inhabitant;" and thereupon the defendant again proposed to read the said deposition, but the plaintiff opposed its reading and the court sustained the objection, and refused to permit said deposition to be read; to which opinion," &c.

Sexton obtained a *supersedeas* to the judgment and it now came up for consideration.

There was no counsel for the appellant.

William H. Cook, for the appellee, contended that under the provision in the Code, (page 666, sec. 31,) the party desiring to read a deposition on the ground that the witness is more than a hundred miles from the place of trial, must show that he is so absent at the *time of the trial*. The language of the act applies to *the trial*. *Non constat* that he is a hundred miles off when the trial occurs, because he was so a year before. He also submitted that the right to read the deposition depended upon a mere question of fact, and that this court could not undertake to review the opinion of the Circuit Court on such a question.

Per Curiam. (ALLEN P. BAILEY, HUDSON & FULKERSON, Judges.)

"It seems to the court that the only objection raised to the reading of the deposition, set forth in the bill of exceptions, referred to the proof as to whether the witness was more than one hundred miles from the place of trial when the deposition was offered. And it further seems to the court, that the judgment of the inferior court upon such preliminary questions is the subject of review in an appellate court. It is like the decision of an inferior court upon the sufficiency of a notice to take a deposition, or whether a deposition has been regularly taken in pursuance of a notice, or by a proper officer, in which and the like cases the decision has always been considered open to review in the appellate court.

And it further seems to the court, that the question is not, as is presumed to have been supposed by the defendant in error in his objection to the reading of the deposition, where the witness *resided* at the time the deposition was offered in evidence, but whether he be more than one hundred miles from the place of trial. The court must determine whether the facts in proof are sufficient to justify it in inferring whether the witness be more than one hundred miles from the place of trial.

It further seems to the court, that in this case the facts proved, as set forth in the bill of exceptions, justified the inference that the witness was more than one hundred miles from the place of trial, and entitled the defendant to read

his deposition; and that the Circuit Court erred in sustaining the plaintiff's objection to the reading of the same. Therefore," &c.

Judgment reversed and new trial granted.

ERROR. WHEN CURED BY CONSENT.

Bronaugh and Wife vs. Johnston.

District Court at Abingdon, December Term, 1857.

Although a widow cannot recover her dower by a motion for the appointment of commissioners to assign her dower, yet if she make such motion, and the heir or other owner of the land *consent* to such appointment, the assignment is binding upon him.

Every assignment of dower ought to be recorded, even though it was made by commissioners appointed prior to 1850.

Though there was no law, prior to the Code of 1849, authorizing the County Court to appoint commissioners to assign dower, yet if the heir assented to the appointment of the commissioners, their action is binding on him.

On the 26th day of August, 1847, the County Court of Washington county made the following order:

"On the motion of *Malcolm Bronaugh* and *Sarah* his wife, who was the widow of *Austin S. Bronaugh*, dec'd, and with the consent of *Hugh Johnston*, it is ordered that, "three commissioners" (naming them,) "or any two of them, being first duly sworn for the purpose, do lay off and assign to the said *Sarah* her dower in the house and lots in the town of Abingdon, of which *Austin S. Bronaugh*, her former husband died, seized and possessed, and which is now the property of said *Hugh Johnston*, and make report thereof to court."

The records of the court show no further action in the matter till the 24th day of February, 1856, when the commissioners made their report to the court, setting forth that they had assigned dower to *Mrs. Bronaugh* in 1848, but had delayed their report, and the property assigned as dower, was described in the report. "And thereupon the said *Malcolm Bronaugh* and wife, by their counsel, moved the court to confirm the said assignment, whereupon *Hugh Johnston*, by his counsel, appeared in court and moved the court to quash the said report and assignment, upon the ground that the widow had no right under the law to have dower assigned

her by motion merely; and upon hearing the said motion, and considering the same, the court is of opinion that the said report be and the same hereby is quashed; and that said *Johnston* recover his costs, &c. To which opinion of the court the said *Bronaugh* and wife excepted," and filed their bill of exceptions, which was sealed by the court, setting out the proceedings.

The Circuit Court of Washington granted a writ of *superseas* to this judgment; but at September Term, 1857, that court—FULKERSON, J. *affirmed* the judgment of the County Court, on the ground that "the quashing of the report does not affect the rights of the parties in relation to the dower assigned by the commissioners, as it was not necessary that the assignment should be reported to the court at all; and that the proper course for the County Court to have pursued, was to have refused to entertain the motion to confirm the report; and if, therefore, there was any error in quashing it, the plaintiffs had no ground of complaint."

Bronaugh and wife appealed to the District Court.

J. A. Campbell and Bekem for the appellants.

J. T. Campbell and W. Preston for the appellees.

For the appellant it was contended that the motion to quash the report could only be predicated upon some matter of error apparent upon the *face of the report*, and as none such was shown it was error to quash; and the court could not look behind the report.

That an assignment made by a person other than the heir or true owner may be good, if not excessive; and such assignment, if fair, shall bind the heir, for the latter may be compelled to make the assignment. An assignment made by commissioners appointed by the County Court *on motion of the heir or true owner* is good, for it is his own act through the intervention of the court. 1st Lomax' Digest, 93; *Moore v. Waller*, 2 Rand., 418.

That *Hugh Johnston*, being the owner, was the proper person to assign dower. He could have assigned without the intervention of any court; and the act of the court is his act. *Moore v. Waller*, *ubi supra*.

That if the widow had resorted to her bill, *Johnston* would have been the only necessary party. *M. Blair v. Thompson*, 11 Grat., 441.

That any error in the application on the widow's part, to have the commissioners appointed, was cured by *Johnston's* consent. The County Court had general jurisdiction over the

subject of such appointments; and though it might have been irregular for the widow to set the machinery in motion, yet *consensus tollit errorem*. They referred to the case of *Fitzhugh v. Foote*, 3 Call., 13, to show that the court will not enquire with much vigilance into the origin of the motion, but will only correct any injustice done. That case shows that the practice of appointing commissioners to assign dower was sanctioned by the courts, even when there was no statute authorizing such motion.

That the Circuit Court erred in the proposition that it was not necessary to report the assignment to the County Court. This order and assignment were made while the Revised Code of 1819 was in force, and that Code provides that every assignment of dower "under any order or decree of any court" shall be recorded. (Vol. 1, p. 365, sec. 14.) To effect this it was necessary to report it to the court. The clerk could not act in recording it on his own authority.

For the appellee it was contended that prior to the Code of 1849, there was no statute authorizing the County Court to appoint commissioners to assign dower. The widow could only proceed by bill in equity or writ of *unde nihil habet*. The act in the Code, (p. 475, sec. 9) allows the court to appoint commissioners only on the motion of the heirs or devisees." It authorizes no application from the widow.

That the assignment must be confirmed by the court; and the court having declined to confirm in this instance, the assignment was void, and therefore could not be recorded.

That the appellee is not concluded by his consent, for it does not appear that he is heir or devisee, and such only can move in the matter. Moreover when the order was made the court had no jurisdiction to make it; and though consent cures error it does not give jurisdiction.

That the case of *Fitzhugh v. Foote* went upon the *lapse of time*, and therefore the court refused to set aside the assignment.

That *Jchnston* in this case occupies only the position of a person submitting a matter to arbitration, which submission he may revoke at any time.

That injustice may have been done by thus making an assignment without the consent of any one competent to consent, and such injustice could not now be corrected.

Per Curiam. (ALLEN, P., FULTON, BAILY & HUDSON, J.)

The court is of opinion, that the order of the county court of Washington, made on the 26th August, 1847, appointing commissioners to assign dower to *Mrs. Bronaugh*, being en-

tered with the consent of the appellee *Hugh Johnston*, who was the owner of the property, was binding on the parties. The County Court had jurisdiction of the subject matter, and the consent of the parties dispensed with the necessity of a bill, or any previous proceedings.

The court is further of opinion that as the said order directed the commissioners to report their proceedings to the court, it was proper for the County Court, upon the return of said report, to take action thereupon in the same manner as if the said order had been entered and report made in a chancery suit brought for that purpose, and that the County Court erred in sustaining the motion to quash the said report on the ground that the widow had no right to have dower assigned her by motion, and therefore the Circuit Court erred in affirming the decision of the County Court.

Therefore, &c., both judgments reversed with costs, and the cause remanded to the County Court, with instructions to overrule the motion to quash, and to order the report to be confirmed and recorded, unless some other cause be shown.

RAILROADS. NEGLIGENCE. ONUS PROBANDI.

The Richmond and Petersburg Rail Road Company vs. Martha J. Jones.

In Chesterfield Circuit Court, October Term, 1857.

Upon a supersedeas to a Judgment of the County Court of Chesterfield.

A Railway Company in the prosecution of its lawful business is entitled to the same protection and so subject to the same responsibilities, as a natural person.

The want of skill and caution, in the exercise of its privileges, is the true ground, upon which to base any right to recover damages for an injury done to another by a Railway Company, while engaged in its lawful business.

The fact that cattle are killed by collision with a Railway train, at a point where the Railway track crosses a county road, does not render the Company responsible in damages, for it has a right to cross the highway, observing proper care and caution to avoid accident.

And the owner of the cattle cannot recover in such case, without proving want of skill and caution on the part of the Company.

The case is much less favourable to the owner, where cattle are killed, straying on the track of the Company, remote from the point of intersection.

The fence law of Virginia does not make it lawful for the cattle of persons in the neighbourhood to be upon the track of a railway, unenclosed by a lawful fence, but merely deprives the company of any remedy against the owners of cattle, for any damages which may result to the company from their straying on such unenclosed track.

In an action against a Railway Company for damages for killing cattle, the *onus* is on the Plaintiff to prove negligence and misconduct on the part of the Company.

It is not sufficient for the Plaintiff to show the killing by the Company, but it is incumbent on him to show some act of misconduct on the part of the Company, to make out a *prima facie* case of injury.

Roscoe B. Heath and *C. C. McRae* for the plaintiff in error.
Henry Hudnall for the defendant.

JUDGE NASH delivered the opinion of the Court.

The facts of this case, as disclosed by the record, are as follows: The Richmond and Petersburg Railroad Company, being a company legally incorporated by an Act of the General Assembly, for the construction of a Railroad from Richmond to Petersburg, to carry passengers and freight over the same, by means of locomotives and cars propelled by steam-power; was on the 8th day of April, 1856, lawfully engaged in running their train upon their road; when at, or near the crossing of a public, or county road, the train ran over a cow, belonging to the plaintiff in the count below, and killed her; to recover the value of which, this suit was brought. It also appears that the Richmond and Petersburg Railroad Company, at the time of building their road, were assessed with heavy damages for the benefit of the land owners, for keeping up the additional fencing rendered necessary by the construction of their road. It was also proved, that the cow was found dead upon the track of the Railroad, not more than eight or ten yards from the crossing of the public road, with her body mangled, and traces of blood and hair were seen upon the ground and sills, tending to show that the killing had occurred at, or near the intersection of the two roads. It was further proved that Mrs. Jones, the owner of the cow, was a lady living in the neighbourhood, but whose lands did not adjoin the Railroad, who like most of the inhabitants of that part of the country, was in the habit of turning out her cattle to graze and range upon the uninclosed lands of the neighbourhood. There was no proof offered, upon either side, to show whether the train was running at the usual speed, or not; or to show any want of care and skill in the management of the train, on the part of the Conductor or Engineer. Upon this state of facts, the Jury found a verdict for the plaintiff be-

low, and the Court rendered judgment for the value of the cow. And it is the legality and propriety of this verdict and judgment, that I am now called upon to review.

The property destroyed is of small value: but the principles involved are of an interesting character, both to the Railroad Company and to the people of this county; and as there are a number of other suits depending in this Court of a like character, I have been requested to reduce my views of the law applicable to such cases to writing. In the first place I will premise, that while the Books and Law Journals of the day, furnish us with numerous decisions of the Courts of England, and the other States of the Union upon similar subjects: I am not aware that there has been any decision of the Court of Appeals of Virginia upon this subject; doubtless owing to the fact, that the amount involved, would not authorize such a case to be carried to that court. The principles of law by which this case is to be decided are few, and of a familiar character. The Richmond and Petersburg Rail Road Company are the exclusive owners of their road, along which their trains are conducted; and are engaged in a useful pursuit authorized by law, in carrying freight and passengers over their road by means of locomotives and cars propelled by steam power. This, is their regular and lawful business; and in the prosecution of which, they are entitled to the same protection, and are subject to the same responsibilities as a natural person. Every man in society has a right to pursue his own lawful business, but if in the prosecution of it, he inflicts an injury upon another by his own negligence or improper conduct, he is responsible therefor. So on the other hand, if a man is engaged in the prosecution of his lawful business and an *accident* occurs, by which another is injured without negligence or misconduct on his part, he is not responsible for it. These principles result from the very nature and organization of civil society, and lie at the foundation of all such questions as we are now considering. Hence it is manifest, that the want of skill and caution in the exercise of their privileges, is the true ground upon which to base any right to recover damages for an injury done to another by a Railroad Company while engaged in their lawful business. But it is said, that the business of running a locomotive upon a Railroad, is one attended with great and peculiar danger. This is certainly true, but the principle is in no degree varied, except that it imposes a greater degree of caution and care in that mode of transportation and travel, than could be required in the ordinary and less dangerous modes. The degree of skill and caution must always be in proportion to the liability to accidents and danger, incident to the business.

But this case presents some other questions, which it may be proper for me to consider. From the testimony in the case it is not exactly certain, whether the cow was killed, being found straying upon the track of the Railroad, at some distance from the crossing of the public road; or was killed exactly at the point of intersection of the two roads. I will consider the case in both aspects of the evidence. 1st. Upon the hypothesis, that she was overtaken upon the public road, exactly at the point of intersection of the two roads, which is putting the case upon the most favorable ground for the plaintiff. In that case, the cow was passing upon a public highway where she had a legal right to travel. And it is equally true that the Railroad Company had a legal right to run their locomotives and cars upon that part of their track which crosses the county road. If the collision occurred there, does it not present the familiar case of two individuals, who have a common right to travel on the same road, and which imposes upon each the duty of so exercising that right, as not to injure the rights of others. The maxim *sic utere tuo ut alienum non laedas*, here emphatically applies. And here again the obligation of the Railroad Company, to observe a proper degree of caution and care in passing such points upon their road, becomes manifestly necessary. And in view of the peculiar nature and mode of traveling by locomotives, propelled by steam, I hold it to be the duty of every Railroad Company, not only to blow their whistle, but to slacken the speed of their trains upon approaching and passing all such places; and in the event of a failure to do so, and the happening of a collision at such a point, I should certainly hold them responsible for any injury that might occur.

The other view of the case, that the cow was found straying upon the track of the Railroad, remote from the point of intersection, certainly makes a case less favorable to the plaintiff, than the one which I have just considered; and if the plaintiff could not recover in the former, without proof of the want of skill and caution, on the part of the Railroad Company, she can certainly have no right to recover in the latter case. It was contended however by her counsel in the argument of the case, that our fence law, which denies to a land owner the right to recover damages for injuries to his crops and lands, by trespasses of stock, except where his lands are enclosed by a lawful fence, was enacted with reference to the known habit and usage of the people of the country, in turning out their stock to graze upon the uninclosed lands of the neighborhood; and was an implied permission to the owners of stock to do so. I do not consider our fence law as conferring any additional right upon the owners of stock, but only to limit and restrict the

right of the land owner to recover damages, to cases where his lands are inclosed by a lawful fence. This, I take, to be the extent and scope of its operation. And in the event of a suit by the Railroad Company, against the owner of stock, by reason of their trespassing upon their road, and causing their cars to be thrown from the track; it might be a good defence to such an action, that the road was not inclosed by a lawful fence. But concede that our fence law gives to the owners of stock the implied right to turn them out to graze upon the uninclosed lands of the neighbourhood; this at most is permissive only; and the owner takes upon himself all the risk of *accidents* which may befall them, as well as a liability for the damage they may do to lands inclosed by a lawful fence. If cattle thus turned out to graze at large upon the uninclosed lands of the neighbourhood, should stray upon the track of a Railroad, the utmost obligations upon the Railroad Company, would be to use all proper care and caution to avoid an injury to them. But if by *inevitable accident* they are killed, it is the misfortune of the owner, and he must bear the loss.

Another question has arisen in this case, about which I have heard some diversity of opinion expressed: and that is, upon whom does the burthen of proof rest, in regard to the question of care and diligence on the part of the company, after the stock owner has established the fact of killing. This question I think too may be readily settled by a reference to the familiar rules of practice in courts of justice. The plaintiff who goes into court, complaining of an injury, is bound to make at least a *prima facie* case, and if the previous reasoning of the court is correct, it is incumbent upon him to show some act of misconduct on the part of the company, before he can even make a *prima facie* case of any injury. The failure to exercise proper care and diligence lies at the very foundation of the action, and if he stops short of this proof, he fails to make out even a colourable case for damages. In order to test this view of the subject, suppose the plaintiff (as it actually occurred in one of the courts in this case) had merely charged in his declaration that the Railroad Company, while in the regular pursuit of their lawful business, had ran over and killed her cow, without any charge of negligence or misconduct on their part. Can it be doubted that such a count would be demurable? If then an allegation of negligence, or want of skill be a material allegation, is it not the duty of the plaintiff to prove it? I deem it unnecessary to say more upon this topic, or to notice the reasoning founded upon the supposed inconvenience and difficulty, on the part of the stock owner, to prove the want of diligence and caution on the part of the agents of the company. These are considera-

tions which might with some plausibility be addressed to the Legislature. But the courts of the country must expound the law as it is. For the foregoing reason the judgment of the county court must be reversed.

CO-EMPLOYEE'S RIGHT OF FOR NEGLIGENCE OF.

Hawley vs. Baltimore and Ohio Railroad Company.

In the Circuit Court of Wheeling.

When an employee enters into the service of a Railroad Company, he assumes the risks incident to such employment, such as the carelessness or unskillfulness of his co-employees, when they were skilful and careful at the time of their employment.

In the selection of servants the company is bound, in such case, only to the extent of care which prudent men ordinarily exercise.

When company is responsible for neglect or carelessness of co-employee.

Hawley was conductor of a train in the service of the company and running between Wheeling and Benwood. In entering the Benwood junction, a side-switch was left open by the carelessness of a switch tender or of a conductor of the regulating-engine, by reason of which the train under the conduction of the plaintiff, ran off of its proper track on to the siding and came in collision with a train thereon, whereby the plaintiff was seriously and dangerously injured.

Good and Russell for plaintiff.

Wheate and Hunter for defendant.

Instructions were asked by the counsel for the defendant, which the court declined to give, but gave the following instructions, which were acquiesced in by the counsel for defendant, but objected to by the counsel for plaintiff.

JUDGE THOMPSON.

1st. The Railroad Company is responsible for care, such care as prudent men ordinarily exercise in their own affairs, in the selection of careful and skillful servants or employees, fitted for the various employments, each is to fulfil.

2nd. If the employees connected with the accident or collision, which resulted in the injury to the plaintiff, were actually careful and skillful at the time of their selection by the

company for the duties respectively assigned them, this fulfils the obligation of the company in selecting such employees.

3rd. When an employee enters into a contract of hiring with such a company, he assumes, with such relation to the company, the natural or ordinary risks incident to such employment, and among these, such as arise from the carelessness or unskilfulness of his fellow employees in and about the business of their common employment, when such co-employees have been selected as first aforesaid, but, except as hereinafter limited or enlarged.

4th. If the plaintiff was injured by the carelessness or neglect of Michael Connor, alleged to have been the switch-tender at the point where the collision and injury occurred, and as such was a co-employee with the plaintiff, placed there to discharge a particular duty assigned him, the neglect of which occasioned the injury complained of, yet, if the plaintiff knew or had a reasonable opportunity of informing himself of any general carelessness or unskilfulness of his said co-employee in and about this special duty, and this special duty was connected with the special employment of the plaintiff and the plaintiff continued in the service of the company thereafter, he is to be presumed by remaining in such employment, in the absence of any notice of such carelessness or unskilfulness to the company, or its officer, having the power of removal, to have assumed the risks arising therefrom.

This instruction applies to the case of Shingleton, another co-employee, (whose duty was claimed in regard to the negligence complained of as identical with that of Connor) substituting Shingleton's name for that of Connor.

5th. If the jury are satisfied that Connor the co-employee, whose neglect is complained of as having been the cause of the collision which occasioned the injury to the plaintiff, had been selected with due care by the company, and it was a part of his duty to attend the switch in question, but was careless in the discharge of his said duty and that the officer of the company, having the power of removal, had notice of this neglect of duty and neglected to remove him, and that the collision in this instance occurred so soon thereafter that the plaintiff cannot reasonably be presumed to have adopted the risk of continuing his employment with this co-employee, then the Company is responsible for such neglect of duty by said employee, provided the company is not excused under other instructions hereinbefore or hereinafter given to the jury. But, if the company used due care in selecting Connor and had no notice of such carelessness, if such existed; or, if he was careless of that duty, so assigned him, and this carelessness was known

to the plaintiff and he continued in his employment; or, if only during their common employment Connor became careless, and his superior officer as aforesaid was informed thereof and neglected to remove him, and the plaintiff with notice thereof continued his employment, under circumstances that it may reasonably be presumed that he continued his employment notwithstanding such neglect; or, if after such notice given and a refusal by the said superior officer to discharge this employee, the plaintiff with knowledge thereof, continued his employment, he must be presumed to have adopted such employment with such risk, and is without remedy against the company.

This instruction applies to the instance of Shingleton *mutatis mutandis*.

6th. Such employees are engaged in a common undertaking in which the safety of all depends on the care and skill with which each one shall perform his appropriate function, office or duty, and each is bound to the careful and skilful discharge of his several employment, and if the plaintiff, by his violation of the general instructions, prescribed by the company for regulating his conduct and of which he had had reasonable opportunities of obtaining a knowledge or of which he had actual knowledge; or, in violation of specific instructions directly communicated to him by one having authority, and whom, under the circumstances it was his duty to recognize as having such authority (and the company has furnished the means of executing any such instructions, as aforesaid; or, by any neglect of general duty incident to his employment; or, unskilfulness on his part in the exercise of his employment, he contributed to his own injury, he is without remedy against the company.

7th. If the jury are satisfied that the plaintiff was not in his proper place at the time of the collision, and that if he had been in his proper place, he should have had a light with him, and that by being there so equipped, he could, by the exercise of ordinary prudence and the ordinary skill requisite for his employment, have prevented the collision, or escaped the injury to himself, then the company is not responsible.

SCHOOLMASTER. POWER OF PUNISHING PUPIL.

Link, by &c. vs. Bell.

Circuit Court of Floyd County, Va., September Term, 1857.

A schoolmaster stands *in loco parentis* towards his pupil during the hours of school.

A schoolmaster may inflict reasonable and moderate correction upon his pupil for misconduct, provided there be proper cause, and the instrument and extent of the chastisement be not improper or excessive.

This suit was brought by *J. H. Link*, an infant, by his next friend, against *J. A. Bell*. The declaration was in the ordinary form in action for *assault and battery*.

First plea—*not guilty*—and issue thereon.

Second plea. "And the defendant for further plea says, that at the time of the supposed assault, beating and wounding in the declaration charged, he, the defendant was a schoolmaster, and the plaintiff was his pupil and under his care and tuition; and for the misconduct and evil behaviour of the plaintiff, the defendant did a little beat and bruise the plaintiff, for his necessary correction for such misconduct, as lawfully he might do, and this he is ready to verify; and this is the assault, beating, &c.

Replication: "And the plaintiff says that the assault, beating and wounding in the declaration charged, was not a necessary and proper correction of him the plaintiff for misconduct and evil behaviour as the pupil of defendant; but was unnecessary, excessive and improper to be inflicted upon the plaintiff for the cause aforesaid; and of this he puts himself on the country." General rejoinder and issue.

Wysor and *Cook* for the plaintiff.

Staples for the defendant.

The evidence shewed the following case. In January 1856, the plaintiff, a lad of sixteen or seventeen years of age, was a scholar in the defendant's school. One cold day, during school hours, the boys were crowding around the stove, producing some confusion. *Blackwell* pushed *Wright* back and the latter fell against the plaintiff, who was in his seat, and merely threw him from his seat. The plaintiff thrust his hand over *Wright's* head and struck *Blackwell* a slight blow: not in anger, but, as was clearly shown, *in fun*. The defendant saw this, and took up the *poking stick*, about four feet long and nearly an inch in diameter, and struck the plaintiff two blows over the back and

shoulders, with the smaller end. The blows were not heavy, nor calculated to do serious injury. He then threw down the stick, and took two switches, and holding them together, struck the plaintiff several blows on the legs. The plaintiff rose up and defendant ordered him to sit down again. Plaintiff said, "I will sit down when I get ready, and you might as well whip an oak tree, for you don't hurt me at all." Defendant then struck him two blows over the head with the switches which broke to pieces. Defendant seized plaintiff and thrust him down on the bench; and one witness said that in this scuffle defendant struck plaintiff two blows on the head with his fist; but this statement was not confirmed by the other witnesses. After pushing him down defendant caught plaintiff by the hair, and *bumped* his head two or three times against the bench, pretty sharply. Defendant asked plaintiff if he would behave if he was allowed to rise; plaintiff said he would and defendant let him get up: as soon as he rose, plaintiff dashed for the door and got out—striking his shoulder against the door as he sprang out. There was, next day, a small knot on plaintiff's head, and a good deal of hair came out; and there was a black bruise on the upper part of his arm, but whether this was occasioned by the blows given him by defendant, or resulted from striking the door, did not appear.

Counsel agreed that the court might charge the jury as to the law, without written instructions; the plaintiff's counsel citing *State vs. Pendergrast*. Deve. and Bat. Rep. (A decision of the Supreme Court of North Carolina,) as the only American case known to them on this subject.

FULTON, J.

While a pupil is under the actual care and government of a schoolmaster, the latter occupies, towards that pupil, the attitude of a parent; and he may lawfully inflict chastisement in any case where the parent might correct the child. Much must be left to the teacher's discretion: still there are limits which he must not exceed. There must be *cause* for the correction, it must not be mere wanton cruelty. The teacher must, in good faith, act in relation to *that cause*; he must believe that it requires and justifies correction. The correction must be reasonable and moderate: such as tends to reform the offender—not to gratify revenge or malignity; it must not go to the length of permanent injury to health, nor must it *disfigure* the child. It must also be inflicted in a suitable manner and with proper instruments, and the use of any means directly tending to produce serious and lasting bodily injury would be improper.

From all the circumstances the jury must judge. *First*, whe-

ther there was cause for correction in this case: *Second*, whether the defendant, in good faith, believed such cause to exist: *Third*, whether the instruments used were such as were fitting for the infliction of punishment: *Fourth*, whether the amount of chastisement was what was adequate to the offence and necessary to maintain the teacher's authority; and lastly, whether that punishment was inflicted in proper temper. If they believe that the punishment was either uncalled for, or excessive in amount, or inflicted with improper instruments, or for the gratification of mere cruelty, they must find for the plaintiff—otherwise for the defendant.

The jury found *for the defendant*.

EDITORIAL MISCELLANY.

The January number of the Journal makes its appearance rather later than usual, for the reason that it was doubtful, at the expiration of the last year for some time whether it would be carried on. This doubt was caused by the fact, that the subscribers had not paid up—for there are more than enough to support the Journal. The balance of the delay must be attributed to the indisposition of the Editor.

It will be seen that quite a fierce contest on that exciting topic, "the lien of the *fi. fa.*" has grown up in our columns; and as we ascertain from some of our Exchanges, has found its way into the newspapers. This has grown out of a review, published in the October number, of the case of *Puryear v. Taylor*. The editorial "wz" of the Law Journal has experienced some sharp commentary, and received considerable compliment on account of the article. The former we bear with commendable equanimity, but to the latter we are not entitled. The article was written by an able and valued contributor, and with his usual ability and force.

While we cannot concur with him in the results at which he arrives, we add our meed of commendation to the ingenuity and power with which he has presented his views of the positions he has endeavoured to maintain.

We have neither time nor space fully to report the decision of Judge Meredith upon the act 1855-6, extending the term of the sheriff's office

from May 1856 to 1st January 1857 ; but we present a brief synopsis of it, kindly furnished by one of the counsel in the case.

Commonwealth v. Drewry et als.

Upon a motion against Drewry as sheriff of Norfolk county for failure to pay taxes, &c.

Drewry was elected in May 1852, and in May 1854, for two successive terms of sheriffalty in said county.

In June 1856, some of the commissioners delivered to the said Drewry books of assessment of taxes. Upon the point whether all were so delivered the evidence was contradictory.

Drewry gave no new bond under the law of 1855-6.

The sheriff elect at the May election of 1856 gave bond and took the oaths of office on 21st of June 1856, but there was no proof that he offered to perform or did perform any duty, as sheriff until January 1857.

The Court held, that the sureties in the bond executed in 1854 for the sheriff's second term, were not liable for the taxes assessed in the commissioner's books for 1856, nor for those assessed on licenses issued subsequent to July 1st, 1856.

In making this decision, the Judge expressed opinions on the following points.

1st. That the delivery of the books to the sheriff prior to the 1st of July did not devolve on him the duty to collect—because his power to collect ceased on that day, unless continued by virtue of the 23rd sec. of 6th art. of the Constitution of Va.

2nd. That the law of 1855-6 requiring a bond of the sheriff continuing over, was to be construed, as only giving power to the sheriff to hold and exercise the office upon his executing said bond—the giving of the bond being a prerequisite to his right to hold and exercise it—and that as he did not do so, his rights as sheriff terminated on the 30th of June, 1856.

3rd. Without deeming it necessary to decide it, the Judge intimated, that though he thought the law of 1855-6 postponing the time of qualification of the sheriff to the 1st of Jan. 1857 was constitutional, yet it was not obligatory upon the sureties in this bond, in so far as it extended the term of the sheriff beyond the period limited by laws in existence at the date of their bond.

The Court therefore gave judgment for the licenses issued before July 1st, 1856, but refused to do so as to all others, and as to the taxes on land and property.

Attorney General for Commonwealth ; Murdaugh, Hubbard & Patton for Defts.

BOOK NOTICES.

REPORTS OF CASES DECIDED IN THE SPECIAL COURT OF APPEALS OF VIRGINIA, held in Richmond, during the years 1856 and 1857. By *John M. Patton, Jr.* and *Roscoe B. Heath*, of the Richmond Bar. Vol II. Richmond, Va. Geo. M. West.

This is the second volume of the Reports of the Special Court of Appeals, and we feel bound to say that the profession are under high obligation to the reporters for the excellent manner in which they have done their work. We have been particularly struck in our examination of the cases reported, with the accuracy of the *syllabus* in each report and the care with which all the impertinent or immaterial matter has been stripped from them.

The opinions of the Judges, we are pleased to find, are much briefer than those upon which we commented in our notice of the first volume; and better still, they are not half so numerous. The Reporters have also furnished us with clear, but succinct statements of the points made and the authorities cited by counsel—a most excellent arrangement, and one too little regarded generally. A careful examination of the cases has furnished us with a much larger number of important decisions than are usually to be found in the same space—decisions of importance not only because of the novelty and interest of the questions decided and discussed, but because they have the judicial sanction of some of the first legal minds of the country. We should not be considered as guilty of invidious distinction, if in vindication of our last remark, we point especially to the name of the learned and venerable associate Justice Clopton, a judge whose capacious memory and clear logical powers combine with a well-balanced intellect of the highest order to give to his opinions the impress of a judicial power seldom felt since the days of Marshal.

The volume we notice is, we think, altogether superior in manner and substance to the first volume issued by Messrs. Patton and Heath. That was sadly in want of the pruning knife, though it contained a good deal of valuable decision. In the present instance, the wiry edge of the Judges' *cacoethes scribendi* has been most materially and beneficially worn off, and the Reporters work more easily in their harness. They have evidently labored diligently to make their work a valuable and important addition to the library of the lawyer, and they have succeeded. We wish them the eminent success they deserve.

Want of space prevents us from inserting notices of Brightly's Digest and the N. C. Rep. They will appear in the next number.

THE QUARTERLY LAW JOURNAL.

VOL. III.

RICHMOND, APRIL, 1858.

No. 2.

THE LIEN OF THE FIERI FACIAS.

The number of the Quarterly Law Journal, for October 1857, contains an article on the subject of the lien of the *fi. fa.* which seems to have attracted no little attention, if we are to judge from the fact that the ensuing number presents *two* essays, both of which combat the views set out in the disquisition first named. It is our present purpose to offer some remarks in the way of a reply to those two antagonistic productions; but before proceeding to that task, a brief space may be occupied, with some possible profit, in considering the tone and temper of those papers.

The article of "W. H." professes, in terms, to be a reply to, or rather a criticism upon the article in the October number. In tone and temper it is unexceptionable. The writer's views are presented in a modest, sensible and manly manner. Whether his opinions are sound and his conclusions correct or not, he is at least respectful towards others, and free from dogmatism and assumption. We can read his article with the feeling that he is dealing with a grave and important question, in the calm and unbiassed temper of a judge; not with the hot and reckless asperity of a partizan, who can tolerate no dissent from his own conceptions.

It is a matter of regret that these commendations cannot be applied to the other article—the one occupying the first pages of the January number. That production does not openly profess to be a reply to the October article; nor is there any open and explicit allusion to that article. Still there are unmistakable indications of the author's purpose to oppose, and if possible, overthrow the conclusions drawn by the writer of the article in the October number. This is shown not only by the coincidence in the choice of subjects, but by many expressions scattered through the article of the January number, particularly at

pages 11 and 12; as well as by the identity of the aspects under which the subject is presented in both articles. Taking it for granted, then, that the purpose of the latter disquisition was to controvert the views maintained in the former one, no apology will be offered for very plainly commenting upon the manner in which that purpose is effected. It is characterized by a dogmatic tone calculated to do anything else than enforce conviction upon a dissenting mind. Its language is that of an advocate rather than a judge; or perhaps it would be correct to say, that it is that of a judge who was unwilling to hear, and determined not to respect an argument opposed to his own views. Strong and sweeping assertion, sustained by little if any evidence, is a conspicuous element in its discussion of the subject; a striking instance of which may be found on page 3, where the writer declares that, "in ninety-nine cases out of a hundred therefore, in which a *ca. sa.* was sued out, even against a debtor who had property, the result was to defeat the creditor by execution, and compel him to begin a new pursuit." Such a declaration is as astounding for its *boldness*, as it is marvellous from its novelty; and will indeed excite the surprise of many an old practitioner. With such assertions as this, a *shew* of support might be made out for any theory. It is not to be wondered at that a mind, capable of hazarding such an assertion, would be not very likely to respect the opinions of others, nor accept them in a spirit of candid appreciation. He would be very apt to imagine that they rested upon no firmer basis of experience and fact than his own. But in one respect, at least, he deserves admiration. It is for his courage. He does not fear to praise and defend the Code of Virginia! *Rara avis in terris!* For nearly nine long years has the writer, whose pen is tracing this tribute to courage and chivalry, been seeking, in and out of his profession, for a single human being, wise or simple, who had a good word to say for the Code, and never until the appearance of the last number of the Law Journal, has his search been rewarded with success. Perseverance works wonders. He had nearly given up the pursuit in despair, when he was himself made the happy instrument of leading the champion into the arena. And how does he deport himself when there. With vigor, at least, if not with effect. He hesitates not to declare, in substance and effect, that those who condemn the Code, deal in "flippant sneers," "random denunciations," and "sweeping condemnation;" and pretty broadly insinuates that those who cannot comprehend the provisions of the Code, are such as could not cross the *pons asinorum* of Euclid. It is submitted that this is hardly the proper style in which to treat of differences of opinion in regard to an important system of legislation, which has had the misfor-

tune to meet with little else than unmixed reprobation. The present writer would beg leave to say, that he is not "flippant" in the expression of his opinions, nor given to dealing in "random" denunciations: that he *has* crossed the *pons asinorum*: and that he had the benefit of nearly ten years of practice under the older, (and with all its faults) *better* system of legislation, which preceded the code of 1849. Since that delectable volume was ushered into existence, he has been in constant contact and communication with *all* the leading lawyers of one circuit; with *most* of those of another; with *part* of those of a third, and, more rarely, with a *few* of those of a fourth. He has practised, more or less, before *six* circuit court judges; has had a good deal to do with one district court, and a tolerably large share of experience in the highest court of the commonwealth; and he has yet to meet a single member of the profession, on the bench or at the bar, who has in his hearing, or to his knowledge, uttered one word of commendation in regard to that unlucky compilation, the Code of Virginia. On the other hand, "denunciation" and "condemnation," very "sweeping" indeed, but neither "flippant" nor "random," have characterized the only sentiments he has ever heard announced in regard to that much abused production. Setting aside his own opinions, he would feel justified in retorting the epithets of "flippant" and the like, did his sense of propriety admit, or the exigencies of his position require, the use of such terms. And, it may be added, that no provisions of the Code have been more bitterly denounced than those relating to the matter in hand,—the subject of executions. The fact that they affect all men, has drawn to them an especial degree of attention; and this condemnation has been pronounced by all classes, without exception, in and out of the legal profession.

Our defender of the Code denounces imprisonment for debt, as a "relic of barbarism," and felicitates his readers upon the impossibility of its restoration. He very complacently says that the framers of the Code have, "it is believed, improved very greatly the remedies of execution creditors by their substitute for" the *ca. sa*. This is indeed a marvellously proper mode of arguing a question. It calmly assumes the whole matter in dispute. *Who* considered imprisonment for debt, *as it was applied in Virginia*, up to 1850, "a relic of barbarism?" *Who* demanded its abolition? *Who* had been oppressed by it? *Who* desired to escape from its operation? We imagine that it was only the dishonest and fraudulent debtor. So far as our experience and observation went, at least all honest men were satisfied with it. We know that others might, unknown to us, have entertained different opinions, and we do not want to fall into

the same error which has just been mentioned, that of hasty, comprehensive assertions, not based on full knowledge of the facts; but we do know that in a pretty large section of Virginia, the abolition of the *ca. sa.* and the almost impotent provisions substituted for it, met with universal and unmixed reprobation. What is meant by *improvement* in the vocabulary of him to whom we are attempting an answer, we cannot say; but if the substitution of uncertainty, confusion, delay, expense, and fraudulent contrivance for the cheap, short, efficient and *honest* remedy of the *ca. sa.* fills up the measure of his idea of improvement, then we can only say that we differ widely in opinion, and respectfully suggest that our view is fortified, as we conceive, by experience, observation and the general opinion of the profession and the community. That the *ca. sa.* may never be restored is very possible: but that does not prove that it was right to abolish it. We may not live to see many other things that ought to exist; and many present evils may survive us. It is to be feared that we shall never see the end of abolition, spirit-rapping, *et id omne genus*: the fantastic notion of abolishing imprisonment for debt, was one of that brood, and may live as long.

It is to be regretted that "W. H." should have given some recognition to this crotchet; for he says that, "the temper of the times demanded the abolition of imprisonment for debt." He will allow us to say, with great deference, that we think he is mistaken in this opinion. "The temper of the times," in New York and New England, might have required this thing to be done, just as it there demands the removal of so many other restraints of the law, human and divine, moral and constitutional; but we do not believe the infection of "the temper of the times" had invaded Virginia in this respect, any more than in most, if not all the other iniquities, so rampant at the North. Had the question of the abolition of imprisonment for debt, as it was used in Virginia, been submitted to our people, on calm investigation, we believe that our law in that respect would have been retained by nineteen votes out of every twenty.

"W. H." does not undertake the hopeless task of defending the Code. He expresses neither approval nor condemnation of its purposes. With a greater degree of equanimity, than we must confess is at our command, yet at the same time with a very chilly air, that indicates anything rather than approbation, he accepts those provisions as the law of the land, and then proceeds to make the most that can be made of them in the matter now in hand. He states the question plainly and distinctly. There is no irrelevant or impertinent matter in *his* discussion of the subject. Stripped of all verbiage and extrinsic matter, what

is that question? It is this. Does the lien of a *feri facias* upon "goods and chattels," as given by sec. 11, chap. 187, of the Code, exist longer than the return day of the writ, where it has not been levied before the return day! Or, in other words, does the general and unrestricted language of the 3d and 4th sections of chap. 188, which is admitted to give an indefinite, continuing lien upon *choses in action* and other estate, incapable of actual levy, operate so as to give to the process the same sort of lien upon the "goods and chattels" mentioned in the chap. 187?

We will take the articles in the January number in the order in which they stand in the Journal. The first article presents very little in reference to the real question. Much, very much, its largest portion could be well spared, and yet everything, bearing on the subject in controversy, would be retained. Many things are asserted and demonstrated which no one ever thought of denying, and everything in relation to judgments and *elegits*, and liens on real estate are foreign to the discussion. The provisions of the Code in reference to those matters may be either wise and proper, or the contrary, so far as the *lien of the fieri facias* is concerned. This question is considered by the writer, to whom we are now alluding, in a very short way, and in a manner which we cannot regard as satisfactory. He does not really approach this question until within the last three or four pages of his article. Nearly all his space is occupied by other matters than the real question at issue. That question we repeat, is whether the lien of an *unlevied fi. fa.* continues after the return day upon "goods and chattels." Its effect as upon *choses in action* is not the difficulty. No one entertains any doubt upon that head; if they did *Puryear vs. Taylor* would settle it. Nor is there any doubt, that if the *fi. fa.* be levied before the return day, the lien continues, upon whatever it may have been levied on. Let us stick to the real question.

Does the lien continue as upon "goods and chattels" after the return day, without levy? Our writer assumes the affirmative. How does he establish his proposition? By a reference to the 3rd and 4th sections of chap. 188, which contain, as he avers, "the pith and marrow of the new law." The phraseology of these sections, in his opinion, is not only broad and comprehensive enough to enlarge the lien of Sec. 11 of the preceding chapter, into a general, continuing, indefinite lien upon "goods and chattels," but is so plain and unmistakeable in its meaning and force as absolutely to require such enlargement. In his opinion the matter is "so clear as not to admit of well-grounded doubt." *Ipsè dixit*. Let us look at some of the reasons advanced in support of this most authoritative announcement.

One proposition is that the Court of Appeals held in *Puryear vs. Taylor*, the views which our writer maintains; or at least, if they have not done so already, that they *will do so* hereafter. His language is this—see page 11. “The judges of that Court; however, certainly will be very much surprised to learn that a Circuit Court has decided upon the authority of *Puryear vs. Taylor*, not only that the lien of a *fieri facias* continues after the return day (which certainly was decided,) and continues upon goods and chattels not levied on, (WHICH IF THEY HAVE NOT DECIDED, THEY CERTAINLY WILL,)—but furthermore, that *such goods not levied on did not become subject to a subsequent execution.*” The italics are the author’s; the small caps are used to indicate an expression which is a key to that author’s mode of treating the whole subject—namely, by mere groundless assumptions. That expression begs the whole question. It asserts the existence of the only matter in dispute. That dispute is, (it cannot be too clearly announced,) whether the lien of a *fi. fa.* on goods and chattels, not levied on, continues beyond the return day. The Court of Appeals has never decided upon the question: the doubt is as to how they ought to and probably will decide it; and here is a writer who boldly undertakes to declare that it will *certainly* be decided in accordance with his view. We might as well strike our colors: the question is settled. Let the court of final resort announce that opinion, and we have nothing more to say. That they will not and cannot so decide is the only thing we have ever contended for in the premises. But whilst we should, with as much grace and patience as possible, bow to such a decision from that court, we do not yield our assent to this annunciation of what that opinion *is to be*. Giving to this dogmatic assumption the only answer which we think it merits, we shall only say that, *we believe and trust*, that the Court of Appeals will decide *no such thing*.

That portion of the above quoted passage, which is italicised by its author, contains a proposition which he condemns as wholly untenable; and which he asserts it is impossible that the Court of Appeals ever can sustain; and his language contains a covert sneer at the judge who did decide in favor of that proposition. He had better restrain his expressions of disapproval of such a decision, real or possible. *It is the natural and irresistible conclusion from his own premises.* The Judge who made that decision only carried out to its proper and logical result, the idea that the lien of an unlevied *fi. fa.* continues after the return upon “goods and chattels.” How can the goods become “subject to a subsequent execution” (at least to any useful purpose,) if the *lien* of the prior writ still continues? The very assertion that the continuing lien of the *fi. fa.* does

not avail to prevent the unlevied goods from becoming subject to a subsequent execution, destroys the whole superstructure so painfully and laboriously enacted by our author. Now the *fi. fa.* is, on all hands, admitted to be a lien until the return day ; no subsequent execution can defeat its operation until that day shall have come : if a subsequent execution can avail at all, it is only after the return day has passed : if then the property become subject to a subsequent execution, it must be because the lien *does not* continue beyond the return day ; yet our writer declares it to be preposterous to hold that the subsequent execution cannot be executed on the goods, not levied upon by the *fi. fa.* If we have not forgotten the little logic we once knew, here is a pretty plain case of the *reductio ad absurdum*.

Our author seems to have some sort of conception of the dilemma in which he was about to place himself by that unlucky declaration as to the operation, or rather non-operation, of his continuing lien as against a subsequent execution ; which feeling is indicated by the use he makes of the last clause of the 3rd sec. chap. 188. The words are, "this section shall not impair a lien acquired by an execution creditor under chapter one hundred and eighty-seven." His construction of this clause is, that it does not preclude the levy of a subsequent execution on goods and chattels not levied upon by force of a prior execution. We think he has not taken the correct view of the purpose of this saving clause ; but admit for argument's sake, that he is right—what is the result ? He contends that this clause authorizes the levy of the junior execution upon the goods not actually seized by force of the prior *fi. fa.* : in other words, that a junior execution, perfected by levy, will override an elder one not perfected by levy. We agree with him in this ; but how does it affect his proposition ? *What becomes of the continuing lien on "goods and chattels,"* of the older, unlevied execution ? Is not this an unconditional surrender of the only question at issue ? Our contention all along has been, that there is *no lien* on "goods and chattels" after the return day, without levy : our opponent admits—nay, declares with an air of triumphant decision, admitting of no question—that a younger execution, perfected by levy, will override the older one under which no levy has been made. What sort of *lien* is that which is destroyed by the levy of a younger execution ? Now, our proposition admits, we humbly venture to assert, of no question : it is that no *continuing lien* on *goods and chattels* is given by chap. 187. That extends the lien, in point of time, no further than at Common Law ; and we all know that there it continued only till the return day. The prolongation of the lien, its character of continuance beyond the return day, must be sought in the

3rd and 4th Sections of Chap. 188; and there its advocates endeavor to show it. By the very terms of Chap. 187, a perfect lien is given *up to the return day*; no junior execution can be levied on the goods, in exclusion of the elder writ, prior to the return day thereof; yet our author tells us that a junior execution, perfected by levy, will avail against an elder one not so perfected. When does it acquire this attribute? Not before the return day of the elder—for *until* the return day the elder may be levied, and thereby hold the property. Why shall it (the younger,) so become available? Because, says our author, it is perfected by levy. But then it could not have been so perfected before the return day of the elder. Why? Because the lien of the elder existed up to the return day. What then prevented the younger from being operative, prior to the return day of the elder? The existence of the lien of the elder. What then gives the younger one this operative power *after* the return day? *The cessation of the lien* that previously was an impediment to its operation. It is no injustice to our author to say, that here he again surrenders the question in controversy. He contends for a lien, continuing on goods and chattels, after the return day, without levy, yet declares it an absurdity to imagine this lien will shield the goods against the levy of a younger execution. This is all we want on this head. No body cares for a *dead* and impotent lien.

Having explicitly conceded that there is no lien on goods and chattels, continuing, without levy, beyond the return day, as against creditors, (for of course, the beneficiaries in subsequent executions can only be creditors,) our author takes great pains to show, further, that there is no such lien as against the other class of persons interested in the question—purchasers for valuable consideration without notice. In commenting upon this portion of the article now under consideration, we feel a great degree of embarrassment from the fear that we may be carried beyond the limits of propriety. We know not the author, and will not say anything unkind or offensive—at least not with the wish or expectation that it shall be so considered: but we must say that it tasks our charity to the uttermost to believe that the writer could be serious in what he has said on this subject. Such conceptions surely never before entered into the mind of man. Such an utter disregard for the plainest meaning of words—such complete dislocation and confusion of ideas never were presented for our consideration. We have scarcely ever heard the least scrupulous advocate, under the excitement of debate and the prompting of interest, (and we have had *some* experience in that way,) more recklessly trample under foot every rule of construction, and every requirement of the most ordinary

degree of reasoning capacity. We had to see the proposition laid down and attempted to be sustained, that a "purchaser" of goods and chattels, and an "assignee" of personal estate meant the same thing—that those words described the same character—before we could have believed that any man could have had the boldness to advance such a proposition. Yet to such a proposition is this writer driven in support of his position. He tell us that the legislature which framed the Code, deliberately confounded these two classes together, and used the terms indifferently. Slight as is the degree of respect which we entertain for the legislative capacity of those who framed the Code, we cannot attribute to them so much weakness and imbecility as is implied in this assertion. Nothing in the Code—nothing in the natural or technical meaning of the words employed—nothing in the character of the things to be operated upon—nothing in the purposes sought to be attained, justifies the belief, that a "purchaser" of goods and chattels is to be considered as an "assignee" of *all* the personal estate. We deem it scarcely worth the time and labor, necessary for the purpose, to go into any detailed refutation of this strange and most untenable proposition. To overthrow it completely it is only necessary to compare the two sections which principally affect the question,—the 11th of chapter 107, and the 3rd of chapter 188. Any one so doing can in a moment perceive that the subject matter—the persons—and the liabilities—to be affected are radically and essentially different.

Strange as is this confounding together of two distinct classes of parties, the result which is made to flow from the union is even more strange. Assuming the identity of "purchaser" and "assignee," and seeing that the "assignee for value without notice," is expressly protected by the 3rd sec. of chap. 188, our very logical writer draws the startling conclusion that a "purchaser for valuable consideration without notice," is protected against the lien on goods and chattels, given by sec. 11, chap. 187 : and that in spite of the very words of that section. Now this is going more than a bowshot beyond anything contended for in our article in the October number. We admitted that the *fi. fa.* gave an express and unquestionable lien, up to the return day, and only contended that it ceased on that day unless completed by levy. We conceded that it "hath this extent, *no more.*" But our vigorous champion of the indefinite, continuing lien will not rest till he has destroyed that which we had felt bound to concede. Upon his view, the lien of the 11th sec. chap. 187, as against *purchasers* for valuable consideration without notice is effectually neutralized. It is true, that to effect this object he uses a term not found in the statute. He

calls the "purchaser for valuable consideration without notice," an "*innocent purchaser*." He evidently considers the two expressions synonymous; and his has the advantage of convenience. He then couples this *innocent* purchaser with the "assignee for value without notice," alluded to in sec. 3, of chap. 188; and boldly asserts that they are equally protected against the operation of the lien of the *fi. fa.* He utterly ignores the broad distinction between the two classes, made by the varying influence and effect of *notice*. As against his *innocent purchaser*, notice under the one section is wholly immaterial: the lien operates with or without notice; whilst as to the "assignee for value" under the other section, *want of notice* is an effectual protection.

What then is his conclusion? It is set out in a separate paragraph, which we copy as a whole. "There is not the least foundation then for the apprehension that, by reason of the continuing, indefinite nature of the lien, given by sec. 3, of chap. 188, subsequent execution creditors or innocent purchasers for value can be injured; *they are expressly protected*." Yet, in the very next paragraph he says: "To have made the effect of the lien given by that chapter," (we presume chap. 187 is intended, though by a misprint, chap. 189 is spoken of), "cease on the return day of the execution, would have made the law merely absurd and ridiculous." (We will not stop to comment upon the *good taste* and respect for the opinions of others, manifested by the application of such terms as "absurd" and "ridiculous" to that *effect* which our whole article in the October number was written to assert and maintain.)

Let any one compare together the two sentences we have quoted, and say what is the inevitable conclusion to be deduced from them. The writer contends for a general, indefinite continuing lien upon goods and chattels, after the return day, and yet concedes, that that lien is utterly inoperative as against the only two classes of persons who can by possibility be affected by such lien: to wit—creditors and purchasers for valuable consideration, or, as he calls them, innocent purchasers. This is all we want—all that we contended for. We do not care a fig for the *continuing lien* if this is its effect. We only maintained, (or tried to maintain,) that after the return day, if there had been no levy, the "goods and chattels" of the debtor became liable to a junior execution, or would be held by a purchaser for valuable consideration without notice. Concede this and we have not another word to say. As it is completely conceded, we shall not take the trouble to carry the dispute any further with this writer. He has vanquished himself.

Passing from this inconsistent and suicidal performance, we

meet in "W. H." a very different sort of opponent. He builds up no house of sand, to be overthrown by his own breath. Right or wrong, his conclusions are the legitimate results of argument from his premises: He lays down the proposition that there is a general continuing lien after the return day, on goods and chattels not levied upon, and he accepts, without flinching, all the consequences resulting from that proposition. There is no "filling and tacking" with him; but he steers straight forward to his goal, regardless of whatever may have to go down before him. In his opinion this continuing lien *does* affect the rights of all parties with whose interests it is brought into conflict: that it *does* override any claim under a junior execution, even though that junior execution may have been perfected by levy: that it *does* displace and destroy any claim of a purchaser for valuable consideration without notice. His is no impotent and fruitless lien. Having once come into operation by the delivery of the writ to the officer, no subsequent act, or omission can destroy its efficiency, or neutralize its force, except the specific things indicated in sec. 4, of chap. 188. And this is the only consistent and logical conclusion, which can be deduced from the proposition, that there is a continuing lien on goods and chattels. By *lien* we mean something that has power—something that can be enforced. It implies a right and an ability to subject the property to the satisfaction of a particular demand. The lien of an execution is complete and exclusive up to the return day; if that *lien* continues after the return, it must continue with the same attributes which it formerly possessed. If it continues at all, it is as potent and exclusive after the return day as before.

We admit, then, that "W. H.," if he has laid down the proper premises, has drawn the correct conclusion. But he has failed to satisfy us, at least, that he has laid down proper premises. Free we are to admit, that his failure in this respect may be the result of no error in his propositions, or weakness in his arguments, but only produced by that fond adherence to our own preconceived opinions, so characteristic of most men, and from which we claim no exemption. But we still adhere to the negative of the proposition—that the lien on goods and chattels, of an unlevied *fi. fa.* continues beyond the return day.

The lien on "goods and chattels" is given in express terms and against all persons, (except of course an older execution creditor,) by sec. 11, chap. 187. Nothing in that chapter fixes the cessation of that lien. We must look out of that chapter for such cessation. In the absence of chap. 188, that cessation would be effected by the Common Law, one rule of which was that the lien of the *fi. fa.* ceased on the return. But we are

told that we have a new rule of cessation, which rule is continued in the 4th sec. of chap. 188: and that instead of the lien becoming defunct on the return day, if unfortified by levy, it is only displaced by the happening of some of the events named in that section: that some one or more of those events operate in place of the lapse of time at Common Law. Reduced, then, to its simplest elements, the proposition of "W. H." is that the section last named *alone* indicates the cessation of the lien: because if that section does not mark the period when the lien terminates, we are referred to the Common Law which terminated it on the return day. The contest is between that section and the Common Law rule.

Our first objection to the proposition that the section now under consideration prolongs the lien on "goods and chattels" is that such is not its professed nor expressed object. *Per se*, it in no wise alludes to the lien on goods: it in no wise, by its own operation, connects itself with any part of chap. 187. Much may be said about the plain import of words; about the danger of extending provisions of law beyond their manifest scope. Does this section, in terms, apply to the lien given by chap. 187? We cannot discover any such application. We think it a result wholly argumentative in its character—wholly a thing of construction, of implication, of inference. It cannot be attained, *reddendo singula singulis*. "Rightly dividing the word,"—"giving to each its portion;" we cannot come to this conclusion. And why? Because that section distinctly and unmistakeably designates its own subject-matter. That subject-matter—that thing which it unquestionably does affect—that thing to which it does impart continued existence and vital efficacy is, "the lien acquired under the preceding section." In terms at least it is not "the lien of a *f. fa.* on goods and chattels." There is not in the whole section a word or an idea which can, by the operative force of the section itself, be made applicable to the lien on goods and chattels as given by chap. 187. It is not, we conceive, a legitimate mode of argument to allege, that the provision applies to an unexpressed subject-matter, when there is one clearly and distinctly expressed. Here the language is satisfied: we can point out the very thing to which, and to which *alone*, as we contend, it is applicable.

The lien then, which is kept alive by the provisions of this section, is "the lien acquired under the preceding section." What then, is that lien? If it can be shewn to be the lien on "goods and chattels," then it is controlled by the operative words of the fourth section. If it is the same in nature and effect as the lien on "goods and chattels," then the latter must be again held to be controlled by those operative words. Here

is indeed the very *gist* of the whole matter. Is the lien given by sec. 3, chap. 183, the same thing in character and effect, as that given by the preceding chapter on "goods and chattels," and consequently, is it the subject-matter of the words of prolongation in the 4th section so often alluded to? We will briefly state our objections to this theory; and if we should be compelled to recapitulate some of the views embraced in our October article, necessity must plead our excuse.

In the first place, the language of the fourth section of chap. 188, is not appropriate to express the enlarged purpose contended for by "W. H." Suppose the intention had been to prolong the lien upon goods and chattels under chap. 187, as well as that arising "under the preceding section." The language then should have been general: "The lien of a *fieri facias* shall cease, &c," would have been the proper expression; not the restrictive phraseology, "the lien *acquired under* the preceding section, &c." If *all* the power of a *fi. fa.* was intended, why allude to only a part? If, in short, the lien on "goods and chattels" was intended to be prolonged, why not *say so*? Surely so important a provision, affecting the visible personalty of every execution debtor in the Commonwealth, and effectually modifying, and in effect, repealing a fundamental legal principle, ought to have been plainly expressed. The Common Law rule which terminated the lien of the *fi. fa.* on goods and chattels, at the return, must have been known to the makers of the Code, and they could not have been insensible to its importance, and the vast amount of property upon which it operated: is it reasonable to suppose that such a radical and comprehensive modification of that rule would have been left as a matter of mere argument and inference! And that, too, to be deduced from a provision found in a separate chapter from that in which they were treating of that lien? We cannot subscribe to such a conclusion.

In the next place, such a provision as this prolongation of the lien is *unnecessary* in regard to goods and chattels. "W. H." says, that "strictly speaking there is no lien given by chap. 187:" that "the Common Law gives the lien under that chapter." This, we conceive, in no wise strengthens his case, but might not unfairly be construed into an admission of its weakness. The question of the origin of that lien is immaterial. The language of sec. 11, chap. 187, is that the writ "shall bind, &c." Now, whether this be held as giving a lien, *proprio vigore*, or only recognizing the Common Law lien, does not affect the fact that the *lien exists*; nor raise any necessity for providing, in a subsequent chapter, a right already fully and plainly recognized and affirmed. In our opinion, chap. 187 *exhausts* the legal provisions of the Code in reference to goods and chat-

tels. It provides for the issuing, the lien and the levy of the writ; for the sale of the goods, the payment of the money and the suing out of other executions. It is in fact about as well drawn as any chapter in the Code, if it is not in that respect superior to every other. There is little if any ground for complaint in regard to it. But such commendation would be misplaced if it omitted so important a provision as that the execution should continue in force, by way of *lien*, after the return day. Only a single legal provision, not found in that chapter, is necessary, to its full and complete operation. That is the provision in the succeeding chapter in reference to the discovery of a debtor's estate. He may have property which the officer cannot find, or cannot seize. But the summons and interrogatories therein provided for, do not give a lien at all: their only purpose is to afford means for *enforcing* a lien already acquired. With this exception chap. 187 is complete in itself; "W. H." however, apprehends much danger from the supposed inefficacy of the *fi. fa.*, and gives some illustrations of the difficulties that may be encountered in its operation. With all respect to him, we think that his illustrations are so extreme in their character as to defeat the purpose for which they are presented; and yet are susceptible of a sufficient answer,—altogether independently of the theory of a continuing lien. Any case which he supposes can be settled, either by the issue of another execution, to the same or another county, under the provisions of the twenty-first section of the same chapter; or by having the debtor summoned before a commissioner and forced to surrender the property. The argument *ab inconvenienti* fails. But even if there was good ground for this argument, "W. H." regards it in but one point of view; that in which the interests of the execution creditor are involved. He forgets that we are to look at all the inconveniences when we take any into consideration; and the balance of inconvenience is heavily against his theory of a continuing lien. There however, we tried to point out in our former article, and need not now repeat.

Again, the liens respectively given by these two chapters, operate upon wholly different species of property; and this proposition leads us to an examination and comparison of the *subjects* affected by the liens. It will not be pretended that chap. 188, in terms and directly, gives any lien on "goods and chattels." It is only by the use of the words "all the personal estate" of the debtor, that this chapter even incidentally gives any lien upon "goods and chattels." Yet, a valid and sufficient lien upon "goods and chattels" had already been given by chap. 187—or, as "W. H." thinks, was given by Common Law. Why pile one lien on another? That it was not intended to con-

trol the lien under chap. 187, is manifest for two reasons. The first is, that the 3rd sec., chap. 188, recognises the prior lien, and draws a distinction between them. It makes one *primary*—the other *secondary*. The lien under that section is only *auxiliary* and *supplemental*. It only comes in aid of the prior lien. All this we think is inferable from the use of the words “in addition.” An *addition* can only be made to something already in existence—something recognised as in force, but which may fail to effect some given purpose which it is desirable to attain. It is therefore only legitimate and proper to consider the additional lien as the secondary adjunct to a primary lien, already in force, and so far as it is intended to operate, fully capable of being made effectual. The other reason is, that in terms, the secondary auxiliary lien, is not to impair the primary one given by the preceding chapter; and is not to affect a lien acquired under it. This, however, is a view which we shall again present under a different head.

It is not to be denied that the words, by which this secondary lien is given, are very broad. “All the personal estate” of the debtor would seem to include “goods and chattels;” *yet such is not the necessary result*. Paradoxical as this position may appear, yet we have only to remember, that “personal estate” does not *necessarily* mean “goods and chattels.” Goods and chattels are actual, visible, tangible articles of property: personal estate may and does extend to a variety of species of property, having no visible, tangible existence. A man may have a very large and important personal estate and no goods and chattels at all. His goods and chattels may have all been levied and sold, and yet a *personal estate*, ample to pay all his debts, be beyond the reach of his creditors, if the *fi. fa.* is to have nothing but its primary lien on goods and chattels. It is therefore doing no violence to this section to say that it does not embrace, and did not intend to embrace goods and chattels, *capable of being levied on*. They had been already disposed of,—the first well known, distinct and universally admitted operation of the *fi. fa.* was to fasten upon *them* a liability to the debt. They could not be sold—they could not be seized upon a younger execution. As against all the world, *they* were set apart to the satisfaction of a particular demand. Though strictly speaking a part of the “personal estate,” they were a part which required no further legislation. They had ceased to be any part of the *general* “personal estate” of the debtor. They were a portion subject to particular liabilities—governed by peculiar laws.

In the construction of a statute we must look to all its parts, if necessary for the comprehension of any portion. In the whole of chap. 188, there is not a word to shew that the legisla-

ture considered "goods and chattels" as any part of the "personal estate," concerning which that chapter was intended. It is evident they were looking solely to estate *not capable of being levied on*. "W. H." considers the use of the word "possessed" in the 3rd section—also the words "though not levied on," as shewing that the secondary lien given by that section, is to operate upon "goods and chattels." We cannot adopt this conclusion. We have seen that the section uses a term, "personal estate," which does *not* necessarily include goods and chattels, and that it was that term, as we contend, under circumstances and in a connection, which exclude the idea of its applicability to goods and chattels. The term "possessed," is as applicable to property not consisting of goods and chattels, as it is to those articles themselves. A man is as much *possessed* of his bank stock as he is of his negro. Moreover, he may be *possessed* of property—actual goods and chattels, which for some reason cannot be levied on in his possession—but, in which nevertheless, he may have a valuable interest: as in the case of partners, tenants in common, joint stock companies, equities of redemption in personal property, and hundreds of other cases. Here though the property may not be subject to actual levy, the debtor may either alone, or in conjunction with others, be *possessed* of the property. A notable instance of this may be found in *Leslie vs. Briggs* in 5th Leigh; and the experience of any practitioner of long standing will have made him familiar with many such cases. We think, then, that there is no magic in the word *possessed*, to force goods and chattels into the category of personal estate in this section. As to the words "although not levied on," we think they are to be taken in connection with those which follow them—"nor capable of being levied on," and that both describe but one species of property. Both relate to "personal estate"—"of, or to which the debtor may be possessed or entitled." We have already endeavored to shew that these words have a meaning wholly inapplicable to goods and chattels. Now, a man may be in possession of "personal estate," which is not goods and chattels, and which may or may not have been levied on. It may have been levied on when it was not liable to levy—or the levy may have been omitted when it ought to have been made; or the property may not be subject to levy at all. As we read this provision it embraces everything and anything, *except* "goods and chattels," capable of being levied on, as to which no legislation was required. We are not willing to take these words "although not levied on, &c," as extending the provisions of the chapter to "goods and chattels."

Let us look a little further through this chapter to learn how

the words "all the personal estate" are to be understood, and whether there are any limitations and modifications which ought to be taken into consideration in judging whether those words, *as used in this chapter and section*, do include "goods and chattels." What was the object of the whole chapter? It was to provide "means of enforcing the recovery of monies, OTHERWISE than by levying an *elegit* or *feri facias*." It was to reach property which could not be affected by the *levy* of a *fi. fa.*: in other words, *personal estate* "not capable of being levied on." Now the old mode of effecting this was by the service of a *ca. sa.* That process was not to be retained, in deference, we are told, to "temper of the times." Accordingly chap. 188, sets out by abolishing the *ca. sa.* To this object, the first and second sections are devoted; and then comes this 3rd section, intended to remedy the mischief produced by the abolition of the *ca. sa.* But without this section, the force of the *fi. fa.*, as against "goods and chattels," was not affected. That writ was not destroyed; it was left with all its original efficacy—nay, additional power had been given it. As to goods and chattels, capable of being levied on, nothing was wanting: but "personal estate," *other* than such goods and chattels, and that personal estate *alone* was the thing sought to be affected. There is then nothing in the purpose and design of that section requiring it to be extended to goods and chattels, and to be read as if they were expressly named.

Passing over the 3rd and 4th sections, (already so woefully belabored on both sides,) do we find anything requiring us to construe "all the personal estate," as embracing goods and chattels, capable of being levied on.

The fifth section points out the mode (by summons and interrogatories,) for ascertaining the *estate* (not the goods and chattels,) on which the *fi. fa.* is a lien, and any real estate subject to the lien of the *judgment*. Is this machinery necessary in regard to effects which may be *seized* under the *fi. fa.*,—goods and chattels, *capable of being levied on*? Does not the language import that it is to discover such effects as have not an open, notorious, visible, tangible existence? It is possible that this proceeding may be necessary in case a debtor may have concealed his "goods and chattels," but that is not its general and primary purpose. But when such discovery may have been made as will enable the officer to lay his hands on the goods, he seizes them, not by virtue of anything contained in this chapter, but by force of the *primary lien* of the writ, under chap. 187. It is only necessary to remove the physical impediment to the execution of the writ. What are the effects upon which this ma-

chinery—this mode of carrying into effect the *secondary lien* given by sec. 3 of chap. 188, is to operate?

The 6th section declares what they are. "Any real estate, &c.; and any money, bank notes, securities, evidences of debt, or other personal estate, in the possession, or under the control of the debtor," are, so far as practicable, to be delivered "to the same officer," or "to such other" as may be ordered by the court or commissioner. Mark the significant absence of all allusion to "goods and chattels" capable of being levied on: as well as the palpable deviation from the mode prescribed for the disposition of such goods and chattels when seized on a *fi. fa.* "The same officer," in whose hands the execution may have been placed; what need of any further authority has he to take goods and chattels, than that which his precept has already given him? "Or such other as may be ordered" by the court or commissioner: what authority has any tribunal to order goods and chattels to be delivered to any "other" officer than to him who holds the *fi. fa.*?

The fact that money and bank notes are enumerated among the things which may be delivered up, is that those are species of property which may be easily concealed—which are not in fact, "goods and chattels," and upon which a *fi. fa.* rarely, if ever is, or can be levied. They are only liable to the same treatment as goods and chattels, when the officer can lay his hands upon them.

Another reason why these primary and secondary liens ought not to be confounded together, is the difference in their effect, as regards the persons against whom they are to operate. In our former remarks we dwelt at some length on this point, and "W. H." clearly admits the difference. He does not confound creditors, purchasers and assignees into one undistinguishable crowd. He admits that the primary lien—that given by chap. 187—operates only against creditors and purchasers without notice for valuable consideration; whilst the secondary, supplemental lien under chap. 188, works only against assignees and persons paying debts to the judgment debtor who have notice. He does not deny the all-important distinction made by the fact of notice; but he does not, as we think, attach sufficient importance to this fact, in estimating the comparative extent of the two liens. We shall not, however, consume more time in laboring this point.

Continuing our examination of chap. 188, we find in its 17th sec. another recognition of the difference between the two liens. That section enacts, that although a judgment creditor may avail himself of the benefits of *this chapter*, he may nevertheless, (without impairing his lien under *it*,) sue out other execu-

tions, &c." Here is another instance of the care taken to prevent any combination of the functions of the writ: its Common Law efficacy as a lien on "goods and chattels," is left as fixed by chap. 187; while its newly enacted, statutory secondary power as a substitute for the *ca. sa.* is retained in full force. That lien, in so many words, is retained; yet, in the very same section, leave is given to issue other executions, *according to* chap. 187. Now, if by force of sec. 3, chap. 188, a lien is given upon "goods and chattels" as a *part* of "all the personal estate;" and if by sec. 4, that lien is made to continue beyond the return day, what is the use of any new execution? Is there anything for it to operate upon? According to the views of "W. H.," the *fi. fa.* has already attached as a lien upon "all the personal estate," including "goods and chattels," and that lien is a permanent and continuing one, capable of enforcement at any unlimited period: yet, notwithstanding this lien, it was deemed necessary to give *another* execution. Another execution, against what? We answer against "goods and chattels" not levied upon by the former *fi. fa.*; and upon which no lien is given by chap. 188—notwithstanding the generality of the words "all the personal estate;" and as against which the lien of the writ terminated, as at Common Law, on the return day. As to such goods and chattels a *new writ* is necessary, and it is accordingly given by this 17th section—and that too, although this general lien on "all personal estate" is left in complete efficiency. This view alone, to us, seems to settle the question.

There is no more legitimate argument against any particular construction of a statute, than that such construction would be productive of danger in the community, and would entail loss and uncertainty upon purchasers and subsequent creditors. "W. H." is aware of this, and does not deny that disastrous consequences must flow from his construction of this statute; but he consoles himself by the reflection, that a contrary construction would not be free from danger. We do not think that he has shewn any sufficient ground for such apprehension; whilst the dangers resulting from his theory are neither denied nor remedied. He says, that "the clerk's office will inform a purchaser of the state of the liens, and a younger creditor has ample means to compel a prior one to enforce his lien when he holds it as a shield to his debtor's property." And coming to the worst he holds that, at any rate, this dormant lien is *no worse* than that of the *ca. sa.* Now, in regard to the effect of the lien, we hope we may be pardoned a few words, notwithstanding the length to which this article has been protracted. As to a junior creditor, we know of no means whereby he can

"compel the junior to enforce *his* lien," except by a suit in equity. It is true that the younger may seize the goods with his own writ; but this necessarily involves a conflict, and that too, a losing and hopeless one, with the older creditor; and at least this is not "compelling the prior creditor to enforce *his* lien." That, we think, could only be done in equity. But this is one of our main objections to this view of the statute—that it necessarily gives rise to confusion, uncertainty and litigation, which would be avoided by the doctrine that, as against goods and chattels, the lien terminates on the return day.

So far as purchasers are concerned, the means of protection, indicated by "W. H." are still less satisfactory. It would upset the business of the whole country, if every buyer of personal property—every purchaser at sales—thousands of which are made every day—was obliged to go to the clerk's office to see whether there was any old unsatisfied execution against the seller—men could do nothing else. The clerk's offices would be crowded from morning to night. This would never do. The case is not like that of land. Contracts concerning land are comparatively rare. They are generally important, and made with much circumspection, and the clerk's office does generally shew enough to guide the purchaser. The whole history of the title can there generally be found. Not so with personal property. The title to that, for the most part, depends upon possession: apply to it, whether by express legal enactment, or by construction, the principles which control real estate, and the business and commerce of the community would be annihilated. The only means of avoiding this danger is to hold that the lien on goods and chattels ceases on the return day, and that if the creditor would retain any interest in them he must have them levied upon before that day. This being done, *the liability and duty of the sheriff* is a sufficient, and the *only* sufficient protection to others.

In conclusion we must say, that by chap. 187, a lien is given, or at least affirmed, upon goods and chattels, which lien operates only against certain classes of persons, and until a particular time—but as against those persons, and until that time, it is exclusive and legally irresistible: that, according to the terms of that chapter, and the principles of the Common Law, there could be no dispute, either as to the persons or property to be affected, or the time during which the lien could be enforced: that all difficulty and doubt in the premises arises from an attempt to interpolate into this chapter, complete and definite as it was supposed to be, the provisions of a subsequent chapter, intended for a different purpose, operating on a different subject—affecting different classes of persons, and introducing

wholly new and different principles of doctrine and modes of action. To us it seems that this effort has not proved successful. Still we do not wish to be thought dogmatic or intolerant of the opinions of others; for the subject is "not so clear" (as we said in our article in the October number,) as to authorize any one to assume the character of *Sir Oracle* in the premises, until the question shall have been authoritatively settled. Whilst "W. H.," has failed to convince us that our first view was an erroneous one, we are not at all inclined to regret that he induced us to review our positions, and give to a subject of this importance another investigation, the result of which has but strengthened our prior conclusions.

THE DIGNITY OF DEBTS.

Few persons could now be found, willing to acknowledge the truth of Lord Coke's declaration, that "the Common Law is the perfection of human reason." Its faults were many and serious; but it had also manifold excellencies. On the one hand, it was long sustained with stern and unreasonable tenacity: on the other, it has often been assailed by rash and ignorant assaults. The crude and presumptuous arrogance of its would-be reformers, has always been a full offset to the blind and unyielding fidelity of its supporters. We think we hazard little in saying that nearly as much mischief has been done by hasty and unnecessary modifications of the common law, as would have resulted from its maintenance in vigor.

There is one characteristic of the common law to which full justice is seldom done. It was an *honest* law. Stern, unrelenting, and sometimes cruel, it still was animated by the principle of requiring justice among men. It demanded truth, straightforward honesty, and the performance of duty at all hazards. If a contract was made, it must be performed: if a debt was incurred, it must be discharged: if a task was assigned, it must be accomplished: if a benefit was conferred, it must be deserved. No indulgence was shewn to the idle, the negligent, the delinquent, or the depraved. The common law sought to inculcate integrity, to enforce responsibility, and to exact the performance of duty, however inefficient and mistaken might sometimes be the means adopted to effect those purposes.

From this principle was legitimately deduced a rule of great importance in the ordinary transactions of life: one of almost

universal applicability : one which has been loudly and bitterly condemned : one which was long indirectly assailed ; and which has been overthrown to a greater or less extent, in all countries where the common law has been received. And yet it was a rule, wise, wholesome and just in itself ; and the overthrow of which has been, and of necessity must have been, followed by fraud, injustice and mischief. It was a rule, the abrogation of which affords a striking illustration of the mischievous consequences of sacrificing long established principles to the crude whims of plausible empiricism.

The pestilent sophism that "equality is equity," never prevailed at common law. The whole spirit of the system, constitutional as well as municipal, was at war with that dogma. In nothing was this spirit more manifest than in the common law rules regulating the payment of the debts of decedents. When the estate was insufficient to meet all demands upon it, payment was made according to an elaborate scale ; and the "dignity of debts" had always to be carefully regarded in the application of assets. The text writers on the common law, and innumerable decisions of the English courts, inform us of the ancient scale. This was the order. *First*, funeral expenses and testamentary charges. *Second*, debts due to the king. *Third*, debts due on particular statutes. *Fourth*, debts of record, as judgments and decrees. *Fifth*, debts of specialty—bonds, covenants, &c. *Lastly*, simple contract debts. And when his debt was of equal dignity with others, the executor had the right to *retain* his own debt.

No very important modification of this scale had been made in Virginia, prior to the enactment of the Code of 1850, if we except the provision contained in the 60th section of chap. 104 of the Revised Code of 1819, in relation to debts due from fiduciaries. But a new principle was introduced into the pernicious legislation which gave birth to the *Code*. That affair, in the latter part of its 130th chapter, lays down the rules whereby this subject is regulated. Four classes of preferred debts are first specified : to wit, funeral and testamentary charges, debts due to the United States, taxes and levies, and fiduciary debts. Then comes the fifth sweeping clause, embracing "all other demands," and providing for their ratable payment. This is the provision that departs so widely from common law principles : which is so unjust and inequitable in itself, and fraught with so much danger and mischief to creditors, to executors, and to the public. Some of our objections to this law we will briefly indicate.

In the first place, this law is *unjust* as between creditors. *Vigilantibus non dormientibus leges subserviunt* is a maxim, not

alone of strict law, but of justice and common sense. To realize the full extent of the folly, injustice and danger involved in this clause, we must recollect that the statute, in terms at least, makes no discrimination even in favor of record debts. It places the verdict of twelve men, and the judgment of a court upon no higher platform than that occupied by a trumped-up, stale account, sustained only by the vague recollection of a single witness. To this it may be answered that a judgment or decree is a lien on the lands of the testator, and can therefore be enforced in preference to other demands. But suppose there be no lands? There may be a large personal fund and no realty. In only one event can the judgment creditor have a preference over others. When his *fi. fa.* is in the officer's hands at the time of the debtor's death, it is possible that he might be entitled to preference in payment. We understand that this proposition has been sustained by one of the circuit courts; but it has not yet received the sanction of the highest tribunal, and it is not at all certain that it will receive it. That proposition is, at any rate, in conflict with the language of the statute. Its language is, "all other demands:" words of the most extensive comprehension: and we should not have to thank the manufacturers of the Code if it is prevented from working its fullest measure of mischief. In this as in so many other instances, that precious production will have to be corrected or completed by *judicial legislation*.

But it is not alone in regard to debts of record that manifest injustice is done. We hold that the bond of a decedent; his solemn act and deed; or his plain note of hand, fairly acknowledging a just debt, is of *higher dignity* than a mere open, unsettled account, or a stale claim which he, in his lifetime, may have justly and properly repudiated; and which perhaps would never have been heard of but for his death. A creditor who has done all that he can do to shew the justice of his claim—obtained a judgment or taken a note, ought not in common justice, to be placed on a par with the negligent and dilatory claimant, who cannot shew the scratch of a pen in support of his demand. But this leads us directly to another objection.

Our second ground is the facility which, by this enactment, is given to the perpetration of fraud. No man of much practical experience in the business of life, can have failed to notice the number of unjust demands which are set up against the estates of dead men. So great is the extent of this evil practise, that it has become proverbial; and many good men have been tempted, by witnessing it, to wish that no claim could be enforced against the assets of a decedent, unless it were evidenced in writing. But we need not go to this extreme length in considering the dangers which the honest creditor must confront, when his claim

is put on the same footing with a demand, which may be sustained by mere parol proof. In the case of written evidences of debt, we have at least the decedent's own acknowledgment of the validity of the claim: his admission that he owed the debt. But in the other case, we have no such security. It is hard and dangerous to forge a writing: it is easy and safe to set up a parol demand. No man knows, perhaps, the origin or character of the claim: neither the executor, the creditor, nor any one else can make a successful defence. A single witness, perhaps corrupt, perhaps stupid, perhaps ignorant of part of the transaction, may establish against the estate a claim which will deprive admitted creditors of all prospect of payment. The question whether *any* debt, the proof of which rests merely in parol, should be paid out of the assets of a decedent, is too extensive for present discussion, even if it were entirely germane to the subject in hand. We are considering it in a more restricted point of view; merely as to the propriety of putting written and recorded obligations upon the same footing with parol debts; but we may be indulged in remarking that there is great reason in the proposition that the period of limitation should be materially shortened in respect to parol claims, asserted against the estates of dead men. Some, as we have said, go much further than this; and advocate the application, to such demands, of the statute of frauds, and require the debt to be established by written evidence.

But it is not alone the creditor whose rights and safety are impelled by this enactment. The executor or administrator is himself exposed to much danger and inconvenience from being required to place all debts upon an equality. For the space of twelve months, at least, he pays every debt at his peril, no matter how plain and clear may be the proof of its justice. If no other evil results, there is, at least, delay and embarrassment; and delay in the payment of debts is injurious, not only to the parties concerned, but to the whole community. Another serious evil results from this provision. It is the carelessness which is thereby introduced into the administration of embarrassed estates. Self-interest is a great motive-power, and many a creditor has been induced to undertake the task of winding up an involved estate, with an eye to the security of his own demand; and even when not directly charged with the duty, he will aid in its accomplishment, as by-bidding up property, and many other means which may be properly employed. But when his efforts and sacrifices are to tend very slightly to his own benefit; when he can only expect a trifling dividend, shared in common with a host of doubtful demands, any one can perceive that his exertions must be relaxed. So decided has been alrea-

dy the influence of this pernicious enactment, that we find scarcely any fiduciary willing to settle up an estate on his own responsibility. Nearly every one, great or small, where there is the slightest doubt or difficulty is thrown into chancery.

In regard to the general public, the evils of this equalizing enactment are easily to be appreciated. We might content ourselves with the truism that the body politic must always be injured by that which damages any of its members; and we might refer to the fraud, uncertainty, and litigation we have indicated, as illustrations of that truism when applied to our present subject. But there is a higher and broader ground upon which to assail this provision, in regard to its operation upon the community. It is against the *policy of the law*. It has always been an object with good law-makers, to encourage certainty in contracts; and to this end the reduction of contracts to writing has always tended to give them more consideration, and in many instances more obligatory force. This is the idea which in part dictated the Statute of Frauds. But the provision on which we are commenting is directly at war with this policy. So far from teaching and enforcing the propriety of putting contracts into the permanent form of writing, it leads men to consider the fleeting and doubtful testimony of a witness quite as effectual as the seal upon a bond. It was once an object of no little importance to close up an account, and settle all disputes in the lifetime of the parties, because when armed with the evidence of his debt, the creditor had an advantage in the distribution of his debtor's assets. Now the tendency is directly the reverse. By the death of the debtor, validity and force may be, too often unjustly, attached to a claim which could not have been enforced if the supposed debtor were alive.

Slight as these considerations may seem to those who have not well weighed these matters, they will not be held in small estimation by persons to whose experience and observation they are familiar. No one can doubt, as it seems to us, that this modification of the old rule must have a bad effect upon public morality.

We do not pretend to have exhausted the subject; but we have pointed out some, and we think sufficient, reasons why this instance of interference with a common law rule is fraught with mischief, and why our steps, in this matter, ought to be retraced to the firmer and plainer ground on which our ancestors stood.

C.

LAW OF NATIONS.—GOVERNMENTAL POWER OF ARBITRATION.

The Government of the United States has the right to refer the claims of its citizens for wrong done by other states to arbitration, and such arbitration is binding upon the citizen, no matter how erroneous the award may be.

In such case the Government is not responsible, and the claimant has no legal remedy.

Samuel C. Ried for himself and others, of the Brig General Armstrong v. The United States.

In the United States Court of Claims, Washington.

SCARBURGH, J.—Delivered the opinion of the Court.

The petitioner states the following case :

On the 26th and 27th of September, A. D. 1814, the United States private armed brig, General Armstrong, commanded by Sam. C. Reid, belonging to the port of New York, was destroyed by a large British fleet in the neutral port of Fayal, in the dominions of Portugal, in violation of the laws of nations. The government of Portugal, immediately after the transaction, admitted her liability to this government, and called upon England for an apology and indemnification, which were unhesitatingly accorded.

The United States government, from the inception of this claim to the present day, has ever acknowledged the rights of the claimants as legal and just. Under the administration of General Taylor, a fleet was sent to Portugal, and a peremptory demand made for this claim. Afterwards the government of the United States made a treaty with Portugal, whereby she compromised the rights of the claimants, and for a *bonus* agreed to refer the "Armstrong claim" to arbitration. Louis Napoleon, the umpire, decided adversely to the claimants, and contrary to the law and evidence, and the facts in the case, and in violation of his oath as president of the republic of France," the decision having been rendered as Emperor of France.

The treaty and agreement made with Portugal to arbitrate this claim, was made without the knowledge, consent, or advice of the claimants, or their agent. The government of the United States never protested against the award as being illegal, unjust, and contrary to the articles of the treaty, in this case made with Portugal, although she was fully aware of the same.

The government of the United States, in making the treaty with Portugal, without the knowledge, advice, or consent of the claimants, assumed the responsibility and undertook and promised to pay the claimants their justly recognised demand against Portugal, to wit, the sum of one hundred and thirty-one thousand and six hundred dollars, being the amount recognised by this government and demanded of Portugal.

The claim was presented to the congress of the United States on the 19th day of January, A. D. 1854, and referred to the committee on foreign relations in the senate. On the 10th day of March, A. D. 1854, the committee reported in favor of the claimants. On the 26th day of January, A. D. 1855, the bill was ordered to be engrossed for a third reading, by a vote of ayes 22, nays 17. On the 16th day of February, A. D. 1855, this vote was reconsidered, and the bill ordered to lie upon the table, by a vote of ayes 24, nays 23.

The claim having also been presented to the house of representatives, the committee on foreign affairs, to whom it was referred, reported in favor of the claimants on the 29th day of May, A. D. 1854. The bill for the relief of the claimants failed to be acted upon by the house of representatives for the want of time, and was, by a resolution of that body, transferred to *this court*.

This, it will be observed, was originally a claim against Portugal. It is now presented as a claim against the United States. It may have been a just claim against the former, but it may, nevertheless, be without foundation as a claim against the latter. It is as a claim against the United States that it must now be considered.

As a claim against Portugal it was confided to the government of the United States for prosecution. That it was the duty of this government to prosecute it, there can be no doubt; but upon what principles this duty rests it is not material at this point to consider. The government accepted the trust and acted upon it; and it may be assumed that it did so in pursuance of the obligations with it owed to the claimants. As soon as the United States undertook the prosecution of the claim it became their own affair, to be settled and disposed of as any other matter in difference between them and Portugal. Upon this point there can be no dispute. It results of necessity from the relations of the parties. It is equally indisputable that the claim, from its very nature, was referable to the treaty-making power, and, as a necessary consequence, became subject to be settled by any of the methods legitimately within the sphere of that power. Such was the view very properly taken of this subject

by the government of the United States, and it acted accordingly.

The negotiations between the United States and Portugal terminated in a convention entered into on the 26th day of February, A. D. 1851, and subsequently duly ratified on both parts. By that convention it was agreed between the high contracting parties "that the claim presented by the American government in behalf of the captain, officers, and crew of the said privateer ['General Armstrong'] should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties." (Art. 2.) This mode of settlement is not only recognised by the laws of nations, but it is declared to be "a very reasonable mode, and one that is perfectly conformable to the law of nature, for the decision of every dispute which does not directly interest the safety of the nation." (Vattel, book 2, c. 18, § 329.) It is plain, therefore, that the subject-matter embraced by the treaty, and the mode of settlement provided by it, were within the constitutional limits of the treaty-making power.

But a treaty in the United States is the supreme law of the land. Hence this treaty, immediately upon the exchange of the ratifications thereof, became obligatory here as the supreme law upon all courts, both state and federal, and upon all the citizens of the United States. To the extent of its provisions, it concluded the rights of all concerned. As the supreme law, it is a record of such absolute verity that nothing can be averred against it in a court of justice. Individuals may claim rights *under* it according to its legal effect and operation; but it is a complete bar to all claims which may be asserted in opposition to it. It is the supreme law, and cannot be questioned.

The treaty being the supreme law of the land, we cannot go behind it and inquire whether, before its adoption, the proper preliminary steps were taken. This is a matter entrusted by the constitution of the United States to the treaty-making department of the government, and its acts concerning it are final and conclusive. Hence, if it was the duty of the president and senate, before they assented to the convention, to have obtained the consent of the claimants to the provisions in which they were concerned, it will be intended that such consent was obtained, and no averment to the contrary can be received. This results of necessity from the provision of the constitution of the United States that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur," (Con. of U. S., art. 2, § 2, cl. 2;) and the further provision, that "all treaties made, or which shall be made, under the authority of

the United States, shall be the supreme law of the land." (Ibid., art. 6, cl. 3.)

Treaties thus made have all the positive binding efficacy of laws, asserting the same supreme authority, and equally demanding implicit obedience. I speak not now of any power of congress over this subject, but only of the rights of individuals, as they may be affected by a treaty so long as it continues in force. In regard to these, it is as much an obligatory and unquestionable rule as any law of congress made in pursuance of the constitution of the United States.

Upon the same principle, the provisions of the treaty could not be either enlarged or restricted—like any other law, they could be executed only according to their true intent and meaning. If, therefore, the sixth article, under its proper construction, excluded the claimants from the privilege of a hearing before the arbitrator, the secretary of state simply obeyed the law, and but discharged his duty, in refusing to allow them that privilege.

But the petitioner insists that the government of the United States, in making the treaty without the consent of the claimants, assumed the responsibility of their claim against Portugal, and undertook and promised to pay it. This proposition cannot be sustained, because one of its essential elements is that the treaty was made without the consent of the claimants, and, as I have shown, it will be intended that such consent was obtained, if it were necessary. But an effort was made to sustain it upon the broad ground of a state's obligation to protect its citizens at all times and in all countries. That such an obligation exists, cannot be disputed. As here stated, however, it is purely political. Practically, in each state, its development is to be found in the constitution and laws there established. Protection is the great end and aim of civil society, and it embraces everything which is essential to man's well being as a member of society. It is, in political science, a term of very extensive meaning, and is, it is said, but another name for justice, in its broadest acceptation, including everything that is due to man as a social being. It is due to the citizen equally at home and abroad, and to the state as well as to the citizen. It includes both individual and social security. Every political organism which is based upon just principles, and the laws made by and under it, are all framed with especial reference to this great object, and are wise and efficient just in proportion to the success with which it is attained. Hence, it has become a political axiom that "of all the various modes and forms of government, that is best which is capable of producing the greatest degree of

happiness and safety, and is most effectually secured against the danger of mal-administration."

Happiness and safety exist in the highest degree where man's right to protection is most extensively recognised and enforced. But when, either in a controversy between man and man or between the state and one of its citizens, the inquiry is whether the right asserted can be maintained, we must look, not to what the state ought to do, but to what it has done, to its peculiar organism, and to the laws which have been made and are in force under it. If the result of the inquiry be that the right claimed has never been recognised by law—in other words, that the state has never extended its protection to that point—the law may be amended so as to embrace it in future, but for the present, as no right recognised by law has been violated, no wrong denounced by law has been committed. Existing regulations, therefore, can afford no remedy in such a case, and the tribunals created to enforce the system as it is are powerless to give relief. Hence, it is apparent that the petitioner's proposition can derive no support from this source. The truth is, that the obligation of a state to protect its citizens is political only in its character, and the failure to fulfil it in any respect can never subject the state to pecuniary liability.

It seems, however, to be considered that if a citizen have a just claim against a foreign nation, and the state to which he belongs does not obtain actual pecuniary satisfaction therefor from the foreign nation, then, that such satisfaction must be made by the state itself. In support of this doctrine, reference has been made to what was said by the Lord Chancellor in the Baron de Bode's case, (16 L. & Eq. R., p. 23,) and to the *dictum* of Mr. Chief Justice Parker in *Farnam v. Brooks*: (9 Pick. R., 239.) The Lord Chancellor said: "It is admitted law that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress through the means of his own government. But if, from weakness, timidity, or other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country." The *dictum* of Mr. Chief Justice Parker is as follows: "There was, perhaps, an obligation on the government of the United States to procure redress for its citizens, or themselves to reimburse them." He referred to certain illegal captures and condemnations by the French and Spanish governments. We find a similar doctrine laid down by Rutherford. I quote what he says somewhat at length: "Not only such injuries as affect a nation immediately in its collective capacity, but such likewise as are done to any of its members, are a justifiable cause of war. For these, by the law of nations, are

parts of the collective person of a nation ; and injuries which are done to parts of this person, are done to the person itself.

* * * As a civil society is obliged by the social compact to guard the rights of its several members, so it is obliged likewise by the same compact to guard the common interest of the whole. Unless, therefore, the injury which some of the members have suffered, affects, either in itself or in its consequences, the whole society, or such a part as bears a considerable proportion to the whole ; however it might justify a war in respect of the nation which has done the injury, it would scarce justify the governors of the nation to which those who have suffered the injury belong, in respect of the duty which they owe to their own society, if they should hazard the safety of the whole by a war, and sacrifice the lives of many and the fortunes of most of their subjects to redress such an injury. In the mean time the duty which the society owes to its injured members is not superseded. Though the society is not obliged to redress them by war when this method of redress is inconsistent with the general interest ; yet it is still obliged to secure their rights, and this obligation can be no otherwise discharged than by making them amends out of the public property for what they have lost." (2 Ruth. In., ch. ix, sect. 11, p. 491.)

We must not understand this doctrine in too broad a sense. When properly understood, it does not seem to me to be either unsound or objectionable. The usual methods by which contending nations terminate their differences, are, (1) by an amicable accommodation ; or (2) by a compromise ; (3) by the mediation of a common friend ; or (4) by arbitration ; or (5) by an appeal to the sword. (Vattel, book ii, ch.—, § 326, 333.) In every case, each nation must determine for itself, to which of these methods it will resort ; and its determination must of necessity, be obligatory upon its own citizens, and especially upon such of them as may be more directly interested in its immediate action. I do not mean to say that these are the only methods of settlement recognised by the law of nations. I mention these, now, merely to illustrate my views. At home, the citizen lives under the protection of the municipal laws of his country. They define his domestic rights (if I may so speak) and provide the remedy for every privation of them. When he goes abroad, his country's protection still follows him ; but in his relations with foreign states, the law of nations defines his rights, and points out the remedy for any wrong which he may suffer. The obligations of his own country to him are the same at home and abroad. If he needs redress for a wrong which has been done him by a fellow-citizen, he obtains it in the ordinary courts of justice by the remedy prescribed by the muni-

principal law for his case. And so, if he be injured by a foreign nation, his own country asserts his right to redress according to some of the methods recognised as appropriate by the law of nations. Thus far, in the experience of the world, it has not been found practicable for a state to fulfil its political obligation to protect its citizens in such cases, otherwise than by providing for the first, the ordinary courts of justice and the remedies used therein; and for the second, the proper organization to enforce against a foreign state the methods of redress acknowledged by the laws of nations. But, for the failure of a citizen to obtain redress for an injury, a state is in no respect any more subject to a pecuniary liability to him in the one case than in the other. If, therefore, a state, whose citizen has been injured by a foreign nation, enforces his claim by any of the methods which I have noticed, it has fully discharged its obligations to him. The doctrine of the Lord Chancellor in the Baron de Bode's case has no application to such a case.

A state whose citizen has been injured by a foreign nation may, by virtue of the *eminent domain*, from motives of public policy and to advance the general good, generously forgive the injury; or, it may, for a consideration, release the claim to indemnity. In such a case, it does not seek *redress* for the injury, or attempt to *secure the rights* of its citizens; but, on the contrary, it appropriates his private property to public use. As this is done for the public advantage, the state is bound to indemnify the citizen; for, otherwise, the burdens of the state would not be supported equally, or in a just proportion. (Vattel, book i, ch. 20, § 244; book iv, ch. 2, § 12.) It is to such a case, and to such a case only, that the doctrine in the Baron de Bode's case is applicable.

An effort has been made to bring this case within the doctrine of the Baron de Bode's case, as I understand it. The petitioner alleges that "the government of the United States made a treaty with Portugal, whereby she compromised the rights of the claimants, and for a *bonus* agreed to refer the 'Armstrong claim' to arbitration." There is some plausibility in this view. It was upon this point that I concurred in the judgment of this court, heretofore rendered, directing the taking of testimony in this case. If the United States had *compromised* the claim, the act would, as I have shown, have been obligatory upon the claimants. But there was *no compromise*. And so, if they had parted with the claim for a consideration, the act would, in like manner, have been valid; but there would have resulted an obligation on the part of the United States, either to account for the consideration, or to compensate the claimants. But there was no *bonus*. The United States agreed to accept the propo-

sal of Portugal to pay the other claims provided for in the treaty, and to refer this claim to arbitration. Their authority to do this is clear beyond dispute. The act, therefore, is valid. It is not only valid, but final and conclusive. The constitution of the United States makes it the supreme law of the land. It is, moreover, in no sense an appropriation of the private property of the claimants to the public use.

It has been urged that the executive department mismanaged the case before the arbitrator, and that such mismanagement has rendered the United States liable to indemnify the claimants. The alleged mismanagement is as follows: 1st, that the secretary of state refused to allow the claimants the benefit of a hearing before the arbitrator; 2d, that he did not submit to the arbitrator all the evidence in favor of the claimants; and, 3d, that the award was not within the submission, and ought, therefore, to have been rejected.

1. I have already shown that if the treaty, according to its proper construction, excluded the claimants from the privilege of a hearing before the arbitrator, the secretary but discharged his duty in pursuing the course adopted by him. I do not think he mistook his duty in this respect.

2. The petitioner alleges that the correspondence which passed between the United States and Portugal in the years 1814 and 1815 was not submitted to the arbiter. The secretary of state, in his despatch to our *chargé* at Lisbon of March 20, A. D. 1851, said: "When the consent of the arbiter, whichever of the two it may be, shall have been obtained, you will proceed to carry into execution the stipulation of the third article of the convention, viz: to compare and authenticate, jointly with the Portuguese government, the copies therein specified. You will understand, of course, that these copies are limited to such communications as have passed between the American legation and the Portuguese government at Lisbon, and between this department and the Portuguese legation, joined with like compared and authenticated copies of the second and third articles of the convention, and of the protocol." In his despatch to the same, of July 12, A. D. 1851, the secretary said: "To provide, however, against the omission of any important part of the earlier portion of the correspondence—I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal at that time resided, and which it could not have been intended to exclude—I transmit to you herewith a printed copy of the correspondence, as communicated to Congress on the 15th December, 1845." The protocol had already been signed on the 9th day of July, A. D. 1851. The petitioner's reasoning is, that as the correspondence of 1814 and 1815 was not specially men-

tioned in the despatch of March 20, A. D. 1851, it was not included thereby; and that, as the protocol was signed three days before the despatch of July 12, A. D. 1851, in which it was specially mentioned, bears date, that correspondence was not submitted to the arbiter. But this is palpably a *non sequitur*. The petitioner omitted to notice that our *chargé* at Lisbon was directed to proceed to prepare the copies to be submitted to the arbiter *when* his consent to act was obtained, and that our minister at Paris received official notice of the president's acceptance of the office of arbiter only a few days before the 1st day of November, A. D. 1851. Now, although it was impossible that a despatch, written in Washington on the 12th day of July, A. D. 1851, could have reached our *chargé* at Lisbon on the 9th day of the same month, three days before it existed, yet it is not only possible, but so highly probable, that, in the absence of evidence to the contrary, it will be presumed, that the despatch of July 12, A. D. 1851, was received by the *chargé* before the 1st day of the following November. It will, also, in the absence of rebutting evidence, be presumed that the *chargé* obeyed the instructions contained in that despatch. The petitioner has fallen into the mistake of supposing that the copies to be submitted to the arbitrator were prepared at or before the signing of the protocol, whereas, in point of fact, the instructions given to the *chargé* were, that he was to proceed to prepare them *when* the consent of the arbiter to act as such was obtained. The protocol itself provided "that so soon as the arbiter shall have signified his willingness to accept the friendly office tendered to him, copies of all correspondence which has passed in reference to said claim shall be submitted to him." It is clear to my mind, upon the evidence submitted, that the petitioner's second allegation of mismanagement on the part of the secretary of state is wholly unfounded in fact.

3. As to the third allegation of mismanagement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators; they have engaged to do this, and the faith of treaties should be religiously observed. But it is only upon the points submitted that the parties promise to abide by their judgment. If their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestible facts, that it was the offspring of corruption; or flagrant partiality. (Vattel, book ii, ch. 18; §

229.) These are just principles, and if the award in this case could not have been rejected consistently with them; then it ought to have been received.

The petitioner has urged that the questions of law only, and not the questions of fact, involved in the case were submitted; and that the award is not within the submission, because the arbiter decided the latter questions. The second article of the treaty is as follows: "The high contracting parties not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig 'General Armstrong,' destroyed by British vessels in the waters of the island of Fayal, in September, 1814, Her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American government in behalf of the captain, officers, and crew of the said privateer should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties." This language is too plain, it seems to me, to admit of doubt as to its meaning. The high contracting parties not being able to come to an agreement upon the question of *public law* involved in the case, agreed to submit the *claim* to arbitration. The *claim* involved questions both of fact and of law, and it was impossible to decide the *claim* without deciding the *facts*, as well as the *law* arising upon those facts. The parties did not agree as to the *facts* of the case; but, on the contrary, the evidence submitted by them showed that they disagreed as to those facts. There could, however, be no *claim* without facts; and if there were no *claim*, there was nothing for the arbiter to decide. Having the *claim* to decide, he was, therefore, obliged first to determine the *facts* and then the *law* of the case. This was the course pursued by him; and, in this respect, he acted strictly within the terms of the submission. It has not been suggested that the award was, in any other respect, not within the submission. The conclusion arrived at by the arbiter, in relation to the facts, may not have been fully justified by the evidence, but it is not so clearly erroneous as incontestibly to show that it was the offspring of corruption or flagrant partiality. There was conflicting evidence upon the points decided; and although we might think that the preponderance was in favor of the claimants, yet that point is not so clear as to enable us to say that a different decision is so manifestly unjust that it must necessarily have been fraudulent. It seems to me, therefore, that the award could not have been rejected by the United States, without a violation of the public faith.

Even, however, if all the mismanagement imputed to the secretary of state was justly chargeable upon him, it would impose

upon the United States no pecuniary liability to the claimants. A government is in no respect an insurance company. It does not, and cannot, guaranty to any persons the fidelity of any of the officers whom it employs. It is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the officers employed in the public service. If the government makes a contract, then it is bound like an individual to perform it, and responsible in damages for a breach of it. If by any unlawful act of its officers, the money of the citizen gets into its treasury, it is bound by the highest principles of justice and morality to refund it. If, in the exercise of the *eminent domain*, a government takes private property for the public use, it is bound to make just compensation. Such obligations on the part of a government are essential to the preservation of public morals and the liberties of the people, and dictated alike by the highest considerations of public policy and the principles of enlightened justice. But to render a government responsible to its own citizens for the errors, or omissions of duty, or wrongs of its officers, would involve it in endless embarrassment, and difficulties, and losses, which would be subversive of the public interests. (Story on Agency, § 819.) The exemption of a government from such a responsibility rests, not upon any notion of prerogative, but upon considerations of public policy. In the present state of the world, a different principle would be wholly impracticable.

I have examined this case, it will be perceived, in the form in which it has been presented to this court, as a *legal* claim against the United States. I am not at liberty to consider it in any other point of view. It may be true that the claimants are entitled to relief on other grounds. But this is a matter for congress to consider; and congress will doubtless do justice to the claimants. My opinion is, that, as claimants of a *legal* demand, they are not entitled to relief.

GILCHRIST, J.—*dissentiente*.

APPRENTICES.—ASSUMPSIT.

Neighbours vs. Doriot.

Circuit Court of Wythe County, Va. October Term 1857.

The relation of *Master and Apprentice* can only be created by *indenture*, in some of the modes directed by the statute. Code of Va., Chap. 126.

A person receiving into his employment a boy, with an agreement that he shall become an apprentice, and afterwards discharging him, is liable to the father, for the work and labor of the boy, subject to proper deductions for board, clothing and instruction.

A. J. Neighbours sued *Victor Doriot, Jr.*, in the Circuit Court of Wythe, claiming “\$200—the price of the work and labor of *W. H. Neighbours*, the minor son of the plaintiff, done for the defendant at his instance, for fourteen months; to wit: from the 20th November 1855, to the 20th January 1857.”—*Non assumpsit* and *payment*.

A. S. Brown for the plaintiff.

Floyd and Cooke for the defendant.

Interrogatories had been propounded to the plaintiff, the answers to which were used on the trial: from which and other testimony it appeared, that the defendant *Doriot* was a watchmaker and silversmith, carrying on his trade in Wytheville: that the plaintiff wished his son to learn that trade: that in November 1855, he placed the boy, then some sixteen or seventeen years old, in defendant's employment, *on trial*: that it was agreed that the lad should remain with defendant so long as might be necessary to ascertain his fitness for the business: that defendant was to support him during that time: that the boy did remain with defendant, *on trial*, some eight or nine months: that at the end of that term it was agreed between plaintiff and defendant, that the boy should be bound as an apprentice to defendant: that they referred it to a mutual friend to settle the terms upon which he should be bound: that those terms were stated to the defendant, who was not satisfied with them—principally objecting to the charge proposed for the boy's board—it being provided that the boy should board with his father, and the defendant pay for the board: that the defendant then said he would prefer to board the youth himself rather than to pay the price asked: that he did take the boy to his own house for a short time, when he returned to his father's, and continued to board there, and remained in defendant's service, up till about the 20th January 1857, when defendant discharged him: that he had boarded at his father's while *on trial*, but defendant paid for his board, as he also did up to the time of his discharge: that defendant furnished the lad with a good deal of clothing, which

together with what he had when he went into defendant's service, kept him sufficiently and comfortably clad : that on the 29th October 1856, the parties settled on account for the boy's board and washing, and defendant paid plaintiff a sum of money, for which plaintiff executed a receipt, in "full of all demands up to date : " that when plaintiff placed his son in defendant's service, he stipulated for no compensation to himself, but intended the youth's board, clothing and instruction in the trade, and also some schooling to be all that defendant was to pay or furnish in return for his labor : that he never demanded any compensation, and never, prior to the institution of this suit, gave defendant any cause to believe that he expected any compensation. There was a good deal of evidence as to the value of the boy's services—plaintiff endeavoring to shew that the services were of considerable value, but the evidence, for the most part, tended to shew that his services, under the circumstances, and in that particular business, were not worth more than his board, clothing and instruction.

Upon this testimony both parties moved for instructions. The *plaintiff's* motion was in very general terms, being in substance "that if the plaintiff's minor son worked for the defendant, not being bound to him as an apprentice, the jury should find for the plaintiff the value of the boy's labor."

The *defendant's* instruction was, in substance, that "if the plaintiff placed his son in the defendant's employment, upon the footing and in the character of an apprentice, then the defendant is not bound to pay the plaintiff for the boy's work, and the plaintiff can recover nothing in this action ; and his remedy if any he has, is by a special action on the case for improperly discharging the lad, and refusing to accept and retain him as an apprentice."

FULTON, J.

I am not satisfied with either instruction, and shall decline to give either ; but, in lieu of them, will give what I conceive a proper application of the law to the facts ; prefacing it with the reasons on which I base that opinion.

The relation of master and apprentice can be established only by contract, and that too by a *written* contract. No apprentice can be bound by *parol*. None of the rights, remedies or liabilities of the relation can exist, except they be created in pursuance of some one of the provisions of chap. 126 of the Code. That chapter evidently contemplates that every contract of apprenticeship shall be in writing ; and to some of them it superadds the requirement that the contract shall be established by *record* evidence ; as in those cases in which the consent of the

county court is necessary. Moreover if the apprentice is over fourteen years of age (and in this case it is admitted that *Wm. H. Neighbours* did exceed that age,) his consent in writing is necessary to the valid existence of the relation of apprenticeship. Here then there never was an apprenticeship. This boy never was in Mr. *Doriot's* employment "on the footing and in the character of an apprentice"—so that I cannot give the defendant's instruction.

But it does not follow that I am therefore to give the instruction moved by the plaintiff. Though the relation of apprenticeship cannot be established by parol, it does not follow that parties may not enter into a parol agreement, *in contemplation and expectation* of apprenticeship. Every written agreement must be preceded by a parol agreement. Until the written agreement be consummated, and the parol agreement be thereby superseded, that parol agreement must regulate and control the relation of the parties to each other, provided the agreement be about a lawful matter. Now here it was lawful, competent and proper for the parties to agree that this young man should enter the defendant's service, for any suitable period, *on trial*, as they say: that is, to ascertain whether it would be beneficial to all concerned, for him to become an apprentice. On what terms this trial was to be made was a fair subject of agreement; and upon the evidence in this cause, if believed by the jury, the plaintiff is entitled to nothing for that time of trial. That must be thrown altogether out of consideration.

A different conclusion is to be drawn as to the last five or six months of the boy's service. This took place, as the plaintiff alleges, under an express agreement that the defendant would take the youth as an apprentice. That agreement, not being in writing, cannot be enforced as a contract of apprenticeship. It then presents the ordinary case of a special agreement, which cannot be enforced or performed, but under which services have been rendered; and I have always understood the rule to be that, in such case, the value of the services may be recovered in *assumpsit*, under the *quantum meruit* count.

But the recovery, if any in this case, ought to be subject to the proper deductions for the board, clothing and instruction of the young man. So far as their value is concerned, the plaintiff has received, *pro tanto*, what he contracted for.

I shall briefly instruct the jury as follows: "For the time *Wm. H. Neighbours* was in the defendant's service on trial, to ascertain his fitness for the watchmaker's trade, you will allow the plaintiff nothing; for the time subsequent to the agreement to take him as an apprentice, (if such agreement be proved to your satisfaction,) you will allow the plaintiff the value of his

eager to get a rescission of the contract with *Murphy*. At the same time he owed *Murphy* some money on account. Taking every thing into consideration, he offered *Murphy* \$200 to let him off and settle all matters between them, which proposition was accepted, and for this consideration the note was executed, and as *Murphy* supposed all things finally closed up. The answer further stated that when suit was brought on the note, complainant pleaded *non est factum*. He also prosecuted *Murphy* for forgery; but he was acquitted by the examining court; and after that trial complainant *waived* his plea and suffered judgment to go in the action on the note. The note itself was made a part of the answer. There was nothing suspicious about it. It had not been tampered with. The word *hundred* was plainly written as the balance of the note. It contained no *recognition* of the scroll as a seal, so that it was substantially only a promissory note.

Neither party filed any depositions, and the case now came on, upon a motion to dissolve the injunction on the bill and answer.

W. H. Cook in support of the motion.

1st. This court has no jurisdiction, even if the allegations of the bill be taken as true. *Fraud* in the *execution* of an instrument is a good defence at law. The distinction is between fraud in the *procurement* of the contract, and fraud in the *execution* of the instrument. Equity alone has jurisdiction in the former case, except in so far as it is made a legal defence by our statute of equitable set-offs. Code, page 654, sec. 5. But even that section gives no plea of equitable set-off on the ground of fraud in the *execution* of the instrument. That was a clear ground of defence, even at common law. 2nd. Saunders on Plead. and Evid. 60-63. Even in case of a *deed* this is true. Much more so in case of a mere promissory note which this was. *Taylor vs. King*, 6th Munford, 358. *Cockshott vs. Bennett*, 2d Term Rep. 763. *D'Aranda vs. Houston*, 25 E. C. L. R. 517. *Green vs. Gosden*, 42. Idem, 237. *Lord Howden vs. Simpson*, 37. Idem, 237.

2. The plea of fraud and covin is good even in an action on a deed. See the cases before cit'd, in many of which there was such a plea. See also 2nd Chitty on Pleading, 464. Idem, 615. *A fortiori* is this a good defence in debt or assumpsit on a promissory note. Byles on Bills 197. 190. Story on Promissory Notes. Sec. 188. *Gladstone vs. Hadwen*, 1 Maule and Sel. 517. *Green vs. Bevan*, 14 E. C. L. R. 168.

3rd. But it is not even necessary to plead the fraud. It may be given in evidence in support of several special pleas—and in some instances under the general issue. In case of a deed or

specialty, it may be given in evidence under the plea of *non est factum*. 2d Stor. Evid. 479, and cases there cited. *Taylor vs. King*, 6 Munford 358. In an action on a promissory note, it may be given in evidence under the pleas of *nil debet*, or *non assumpsit*, or under that of *non fecit*, which is analogous to *non est factum* pleaded to a deed. This is shewn in many of the cases already referred to. See also the opinion of THOMPSON, J. in *Davis vs. Baxter*, 2 Pat. and Heath, at page 141.

4th. The complainant then had a sufficient defence at law, and he shews no reason at all for not making it. In fact he did plead *non est factum*, (without reference, I suppose, to the fact that the paper was not a specialty,) and then saw proper to abandon it. He could have pleaded *non fecit* or *nil debet*, and set up the alleged fraud. Now the rule is, that when the facts amount to a legal defence, that defence must be set up; and if a discovery be needed, equity will aid in that discovery to be used on the trial at law: or the defendant can file interrogatories in the law court. *George vs. Strange*, 10th Grat. 499. All that a court of equity could have done in this case would have been to entertain a bill for discovery. But the present bill does not even shew any necessity for that proceeding. No accident, surprise or defect of testimony is suggested. For anything that appears, complainant might have had full proof at law.

5th. It is contended that courts of law and equity have concurrent jurisdiction in cases of fraud. This is true, in so far as that either court may avoid a fraudulent transaction. But when the one court has already, as in this case, taken charge of the cause, the other cannot intervene and usurp jurisdiction. A court of equity has no right to transfer to its own bar the trial of an issue pending, or already decided in a court of Law. The cause must end in that court which first obtained jurisdiction. *Per* TUCKER, J., in *Haden vs. Garden*, 7th Leigh, 157. *Per* BALDWIN, J., in *White vs. Washington*, 5th Grat. 647.

6th. The case of *Harden vs. Garden*, before cited, is decisive of this. The two are precisely analogous; and there the whole court refused relief in equity after a failure to make defence at law.

7th. The case has been argued as though the allegations of the bill were taken for true. But the answer denies every material statement of the bill, and there is not a particle of evidence on either side. The result is obvious.

The case was not argued for the plaintiff.

FULTON, J. Equity has no jurisdiction of this case; and if it had, the bill is overthrown by the answer. The injunction must be dissolved.

Order made dissolving injunction.

SLAVE CANNOT ELECT TO BE FREE.

Bailey et als. v. Poindexter's ex'or. Howle et als. v. Same.

In the Supreme Court of Appeals of Virginia, January Term, 1858.

The provisions of a will giving to slaves the option, at the death of a life tenant, of being emancipated or sold are void, the slaves having no legal capacity to make such election.

Slaves have no civil or social rights, no legal capacity to make, discharge or assent to contracts.

This case turned upon the construction of certain clauses in the will of John L. Poindexter, which are set forth in the opinion of Judge Daniel.

The arguments of counsel are too extended for our brief space, but we propose, in the ensuing number, to extract largely from a very able and interesting argument by Mr. John Howard, discussing not only the direct question involved in this decision, but entering fully into the consideration of the civil *status* of the slave, as displayed in the decisions of the courts, and the constitutional and legislative provisions which affect that *status*.

Gregory & Pierce, Robertson, Howard & Sands for appellants.

Patton, Crump and Branch for appellees.

DANIEL, J., delivered the opinion of the court.

There does not seem to me to be any serious doubt as to the intention of the testator, in respect to the emancipation of his slaves.

The language of the main clause, in the will, bearing on the subject is as follows: "the negroes loaned my wife, at her death, I wish to have their choice of being emancipated or sold publicly. If they prefer being emancipated, it is my wish they be hired out until a sufficient sum is raised to defray their expenses to a land where they can enjoy freedom; and if there should

not be enough perishable property loaned my wife to pay off the legacies to Ann Lewis Howle and Georgianna Bryan, they are to be hired until a sufficient sum is raised to pay the deficiency. If they prefer being sold and remaining here in slavery, it is my wish they be sold publicly and the money arising be equally divided between my sister Eliza Marshall, the children or heirs of my brother Carter B. Poindexter, my nephews Wm. C. Howle and Daniel P. Howle and my niece Nancy Bailey."

Here, it seems to me, is a plain and unambiguous tender by the testator to his slaves, of an election, at the death of his wife, to be emancipated or to be sold publicly as slaves.

If they prefer to be emancipated, it is his will that after being hired out till the sums mentioned are raised, they shall enjoy their freedom. If, on the other hand, they prefer to remain in slavery, then it is his will that they remain slaves.

This view of the character of the bequest is not as I conceive affected by the subsequent clause of *the will*, relating to the slaves. The office of that clause is to empower the executors to sell such of them as prove refractory, and, by consequence, to exclude them from the benefits of the previous provisions, in favor of all the slaves, loaned to the testator's wife. This *exception* to the bequest does not serve, in any manner to, or explain the *nature* of the bequest.

The *codicil* to the will does, however, I think, aid in showing that the idea of an election by his slaves, with its consequences, was distinctly and prominently presented to the mind of the testator, while engaged in planning and setting out the scheme of his will. For, reading the *codicil* and the clause in the will respecting the emancipation of the slaves, together, we see that the testator, after tendering to the slaves, in plain terms, the option of being emancipated or sold publicly, proceeds, not only to point out distinctly what is to be the effect of their election, in each of its aspects, on their own condition, but makes the measure and shape of bequests, to other objects of his bounty, dependent upon it. In case the slaves prefer to remain in slavery, they are to be sold and the proceeds to be divided between the sister and certain of the nieces and nephews of the testator. On the other hand, if they prefer to be emancipated, the consequent disappointment of the legatees, just mentioned, is to be compensated by a pecuniary legacy of a thousand dollars, to be paid them by Jaqueline L. Poindexter, another of the testator's nephews, and obviously one of the most favored objects of his testamentary regard. With these views of the will before me, I can not undertake to say that there would not be as plain a violation of the testator's intention in forcing emancipation and its consequences on his slaves, against their election

to remain here in slavery, as there would be in withholding freedom from them on their expressing a preference to be emancipated.

Looking to the subject matter of the bequest, it is true, we may conjecture that it was probably the expectation of the testator, that many, perhaps most, of the slaves would elect to be emancipated; yet when we see that no provision is made, in the will for the support of any of them, in the strange land, to which, in case of their emancipation, they were to be transported, we may as fairly suppose that it was in the contemplation of the testator, that there would be some of them, especially of the aged and infirm, who would prefer to remain in their present condition. In this aspect of the case, what warrant have we for declaring that an election by the slaves to be emancipated is not at all essential to their receiving their freedom under the will of the testator. It is conceded that the effect of such a decision would be to work an absolute emancipation of all the slaves, in spite of a choice to the contrary, by any or all of them; it being admitted by the counsel, who recommends this course to us, that in such a state of things, the clause in respect to the election of the slaves to remain in slavery would be wholly void and inoperative. The will would then, according to his view of it, of itself confer the franchise, and no act of the negroes would be allowed to defeat their manumission or operate their disfranchisement.

We can not adopt the course thus recommended, without running counter to the plain and express directions of the testator. The whole tenor of his will shows that he intended the manumission of the slaves to depend on the performance by them of the precedent condition of electing to be emancipated. We have no authority for regarding this condition as mere surplusage, and declaring the slaves absolutely emancipated. If the condition is legal and possible, we are bound, in carrying out the testator's intention to allow the slaves an opportunity to perform it. If on the other hand we find it to be illegal or impossible, we are equally bound to declare the bequest, dependent on its performance, void.

It is not competent for us, supposing the condition to be illegal or impossible, to pronounce on the will of the testator, what, we may conjecture, he would have directed, in respect to his slaves, had he foreseen the difficulties which now present themselves. Nor did we pursue any such course, in the case of *Osborne v. Taylor*, 12th Grat. 117. The slaves there were declared to be absolutely and unconditionally free, not because of any belief or conjecture, on the part of the court, that such would have been the testator's will, had he known of the illegality of

the condition, which he sought to annex to the bequest of their freedom ; but because having by a distinct clause declared them to be free, he could not then confer on them the capacity of electing to disfranchise themselves and to assume a condition of qualified slavery. On the supposition that an election, in this case, by the slaves, to be emancipated is illegal or impossible, the two cases, instead of calling for the same judicial result, furnish marked illustrations of the directly opposite legal effects of conditions precedent and conditions subsequent. There the election by the slave to assume a state of qualified slavery was essential to the defeat or destruction of the bequest of freedom, whilst here the election by the slaves to be emancipated, is essential to give any force or validity whatever to the bequest. We are thus led, necessarily to the inquiry, whether the condition precedent, in this case, be legal and possible or otherwise.

Is the condition one, which the slaves have the legal capacity to perform ?

To answer this question, it is essential to institute a brief enquiry, as to the true condition here of the class of persons to which they belong.

Chancellor Kent, in the second volume of his Commentaries, at page 253, in speaking of the laws of the Southern States, on the subject of domestic slavery, says: "they are doubtless as just and as mild, as is deemed by those governments, to be compatible with the public safety and the existence of that species of property ; and yet, in contemplation of their laws, slaves are considered, in some respects, as things or property, rather than persons, and are vendible as personal estate. They can not take property by descent or purchase, and all they find and all they hold belongs to the master. They can not make lawful contracts and they are deprived of civil rights. They are assets in the hands of executors for the payment of debts, and can not be emancipated by will or otherwise to the prejudice of creditors. Their condition is more analagous to the slaves of the ancients than to that of the villeins of feudal times, both in respect to the degradation of the slaves and the full dominion and power of the master."

In the case of *Emerson v. Howland*, 1 Mason R. 45, which was a suit brought by a master to recover wages for a mariner slave, who, by his own consent had been discharged from service. Judge Story, in delivering an opinion, sustaining the action, uses the following language. "The slave could not consent to be discharged. The contract was entered into, by the owner in Virginia, and must be construed with reference to the *lex loci contractus*. In Virginia, slavery is expressly recognized and the rights founded upon it are incorporated into the whole system of

the laws of that State. The owner of the slave has the most complete and perfect property in him. The slave may be sold or devised or pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract, and the perpetual right to his services belongs exclusively to his master."

Judge Tucker, in his notes to his edition of Blackstone, vol. 2, p. 145, after defining social rights to be such as appertain to every individual, in a state of society, without regard to the form or nature of the Government, in which he resides, proceeds to say that they include all those privileges, which are supposed to be tacitly stipulated for, by the very act of association: such as the right of protection from injury, or of redress from the same by suit or action, and the right of acquiring, holding and transmitting property; that in all civilized nations, all free persons, whether citizens or aliens, males or females, infants or adults, white or black, of sound mind, or idiots or lunatics, have their respective social rights, according to the customs, laws and usages of the country. "Slaves only," (he continues,) "where slavery is tolerated by the laws, are excluded from social rights. Society deprives them of personal liberty and abolishes their right to property, and in some countries, even annihilates all their other natural rights." And in his appendix to the same volume, p. 55, after remarking that the Roman lawyers look upon those only as persons, who are free, putting slaves into the rank of goods and chattels; he says that the policy of our legislature seems conformable to that idea, and he proceeds: "Slavery, says Hargrave, always imports an obligation of perpetual service, which only the consent of the master can solve," and—"the property of the slave is absolutely the property of his master, the slave himself being the subject of property, and as such saleable and transmissible at the will of the master." To the like effect are the remarks of Chancellor Dessausure, in the case of *Bynum v. Bostinck*, 4 Dess. 166. He there expresses the opinion that the condition of the slaves, in this country, is analogous to that of the slaves of the ancient Greeks and Romans, and not that of the villeins of feudal times—that by the civil law, which in that regard is the law of this country, they are incapable of taking property by descent or purchase, and that they are generally considered not as persons but things. In the case of *Girard v. Lewis*, 6 Martin R. 559, it is asserted that slaves have no legal capacity to assent to any contract; that while with the consent of the master, they have the moral power to enter into such a connection as that of marriage, the marriage, whilst they remain in a state of slavery, could be productive of no civil effect, because slaves are deprived of all civil

rights. And in *Graves v. Allen*, 13, B. Monroe 190, it is declared that whilst they may, with the assent of their masters, have the physical use and enjoyment of property, they are incapable of becoming the legal owners thereof; and that any devise to them, except that of freedom, is void. See also *Robertson v. Robertson*, 31 Alab. R. 273. *Neal v. Farmer*, 9 Ga. R. 555. 3 Rich. Eq. R. (S. C.) 269. *Thomas v. Palmer*, 1 Jones Eq. R. (N. C.) 249. *Dred Scott v. Sanford*, 19 How. 407, 475. The general principles declared and illustrated by these authorities have been fully recognized by this court, whenever it has had occasion to make any express declaration of opinion respecting them. The law empowering masters to manumit their slaves by deed or will, it is true, has, on various occasions, been most liberally interpreted, in favor of the latter; yet the court has uniformly refused to recognize any capacity in the slave to contract with his master for his manumission. *Sawney v. Carter*, 5 Ran. 173. *Stevenson v. Singleton*, 1 Leigh, 72, and has also repeatedly denied the validity of bequests, in which it has been sought by masters to clothe their slaves, whilst remaining in a state of slavery, with certain privileges and immunities; such as, being allowed to remain in the service of particular parties and receive wages for their labor; or to live on certain lands, working them and enjoying the profits, freed from all obligation to render service to persons under whose care and protection they were left. As in *Rucker v. Gilbert*, 3 Leigh, 8. *Wynn v. Carrol*, 2 Grat. 227, and *Smith's adm'r v. Betty*, 11 Grat. 752.

It is argued, however, that the precise question under consideration, has been decided by this court, in the cases of *Pleasants v. Pleasants*, 2 Call. 319, and *Elder v. Elder's ex'or*, 4 Leigh, 252.

It is true that in each of the wills of John and Jonathan Pleasants, out of which the controversy in the first mentioned of these cases arose, expressions are used, which, if taken alone, would indicate a desire on the part of the testators that the wishes of the slaves should be consulted in respect to their manumission, but when we look to the general tenor and leading purposes of the two instruments, it is left extremely doubtful, whether either of the testators designed that the operation of the bequests should depend, in any measure, on the choice of the slaves. No such question seems to have been presented by the pleadings; nor does there appear to be, either in the extended arguments of counsel, or in the opinions of the judges, (delivered at much length, nor in the decree of the court, any reference whatever to the option or choice of the slaves. Any authority to be deduced from the case, as bearing on the question in hand,

would, therefore, necessarily be the result of presumption or conjecture, and entitled, I think, to little, if any weight.

In the case of *Elder v. Elder's ex'or*, (it must be admitted,) the will to be construed and executed, does, in all its features, which disclose a purpose on the part of the testator, to leave the manumission of his slaves to their election, bear a very close resemblance to the will in the present case. The case, however, as an authority is, I think, obviously open to some of the same criticisms that apply to *Pleasants v. Pleasants*. For it does not appear from the abstract of the will, that the complainant raised any question as to the capacity of the slaves to make an election. The *gravamen* of his allegations being, that the slaves conditionally emancipated by the will, had never elected to go to Liberia, but that on the contrary, the executor having fully explained the will to them *and their rights under it*, they had declared they would not go and preferred to remain in Virginia, in slavery, and that they had remained for nearly two years, since the testator's death, nearly a year beyond the expiration of the period within which they were, by the terms of the will, to make their election. It will be seen, too, that during the progress of the cause, in the court below, the complainant consented to an order of the chancellor, appointing commissioners to examine the slaves and to ascertain from each individual, and report to the court, whether they were, severally, willing to go to Liberia. Of the arguments of counsel, in this court, we have no report, and we are therefore without the means of ascertaining, except from intimations thrown out by the members of the court, in the course of their general opinions, on what grounds it was sought to reverse the action of the Chancellor. I think, however, it may be fairly deduced from the opinions of the judges that the stress of the case was in the questions, whether the testator could emancipate his slaves, by directing them to be sent to Liberia, and whether according to a fair interpretation of the will, the slaves were bound to make their election, within twelve months after the decease of the testator. It was to these questions that the court mainly addressed their attention and remarks. I have failed to discover any observation in any one of the opinions of the judges, from which to raise the inference that the distinct question of a want of legal capacity, in the slaves, to make an election, at all, was a matter of discussion before this court. In the state and shape in which the controversy apparently stood before this court, it might, perhaps, be going too far, to say that the question could not have arisen; but in view of the circumstances, which I have adverted to, it seems obvious to remark that for this court to have decided the case adversely to the negroes, on the ground that they had no legal

capacity to make an election, would have been to place itself, seemingly, in the ungracious attitude of being astute to set up an objection to the claim of freedom, which the appellant was not insisting on, and which, from his bill, as well as from his course in the court below, he did not appear disposed to raise.

From these considerations, whilst there are remarks in the opinions of some of the judges, showing that there did not appear to them to be any thing illegal or impossible in the condition of an election by the slaves, the decision would seem to me to come far short of occupying the position on which it would have stood, had it appeared that the question had been distinctly presented to and adjudged by the court.

Therefore, whilst entertaining the highest regard and veneration for the great learning, ability and general worth of the judges who decided that case, I can not recognize the decision as imposing on the exercise of our own judgments, those restraints which could result properly alone from a decision in which the question appeared to have been fully considered and unequivocally adjudged. Nor do I think we should be deterred from a free examination of the question, by apprehensions lest, in the event of our coming to a conclusion at variance with the supposed authority of that case, we might inflict possible injury on fiduciaries and their securities, in instances where, it is suggested, relying on such authority, executors and administrators may have assented to like bequests. For I do not think the case has ever been regarded, by the profession as an authority, on the force of which the definitive settlement of the question could be safely predicated. Indeed, in the present case, the circuit court has so far disregarded the authority of *Elder v. Elder*, as to declare the negroes free, without first instituting the proceedings that were had in that case, to ascertain their choice, and their own counsel, in the argument here, have widely differed among themselves, in respect to the necessity or propriety of any such proceedings.

I should suppose that the instances, if any, are extremely rare in which executors, acting under wills, with such peculiar features, have failed to protect themselves, by seeking the advice of the courts, before committing themselves to the hazardous and irremediable step of assenting to the bequests of freedom. Under these circumstances, I have conceived it to be my duty to regard the question as one to be tested by the general and acknowledged principles pertaining to the subject, and not as one controlled by the influence of a special adjudication.

And when we so treat the question, it seems to me there can be no longer any serious difficulty as to the proper solution.

When we assent to the general proposition, as I think we must

do, that our slaves have no civil or social rights, that they have no legal capacity to make, discharge or assent to contracts; that though a master enter into the forms of an agreement with his slave to manumit him, and the slave proceed fully to perform all required of him in the agreement, he is without remedy, in case the master refuse to comply with his part of the agreement; and that a slave can not take any thing under a devise or will, except his freedom; we are led, necessarily, to the conclusion that nothing short of the exhibition of a positive enactment, or of legal decisions having equal force, can demonstrate the capacity of a slave to exercise an election, in respect to his manumission.

Any testamentary effort of a master to clothe his slave with such a power, is an effort to accomplish a legal impossibility.

No man can create a new species of property unknown to the law. No man is allowed to introduce anomalies into the ranks, under which the population of the State is ranged and classified by its constitution and laws. It is for the master to determine whether to continue to treat his slaves as property—as chattels—or in the mode prescribed by law, to manumit them, and thus place them in that class of persons to which the freed-negroes of the State are assigned. But he can not impart to his slaves, as such, for any period, the rights of freedom. He can not endow with powers of such import, as are claimed for the slaves here, persons whose *status* or condition, in legal definition and intendment, exists in the denial to them, of the attributes of any social or civil capacity whatever.

No conflict with these views is exhibited by shewing that the master may make his slave his agent, and bind himself to others by his acts. The only analogy between the position of the slave and that of the freeman employed in a like capacity, is to be found in the fact that the slave and the freeman are both, for the occasion, the mere creatures of the master, and in the further fact that the power given is, in either case, revocable at his pleasure. The resemblance between the condition of the slave and freeman, for the time, grows not out of the fact that the master has invested the slave or recognized him as invested, with the characteristic powers of a free person, but out of the fact that the freeman has chosen to subject his own conduct and action, for the occasion, to the will and control of another. The agency of the slave, in truth, instead of affording any argument in behalf of the existence of his *social* or *civil* rights, is but an instance or illustration of the complete *dominion of the master*; of his entire control over all the powers and faculties of his slave, and of his right consequently, to use him as an instrument or medium, through which to make or execute contracts with third persons.

A master contemplating the manumission of his slaves might, no doubt, first ascertain their wishes on the subject, and if he pleased, then proceed to shape his course accordingly, and it could form no objection to a deed or will, emancipating them, should it appear on the face of the instrument, that the act of manumission was in conformity to their choice. But by establishing this proposition, the counsel for the appellees do not, it seems to me, reach any ground on which to found an argument in favor of the validity of the bequest in this case. In the case supposed, the act of emancipation is executed, complete and ended. It neither adds to, nor detracts from its force, that the master, in the execution of the instrument, consulted the wishes of the slaves. The operation of the instrument then is, in no wise, dependent upon any thing the slaves have done or are to do in the matter. But in the case before us, the operation of the will, as an instrument of emancipation is made to depend on the choice of the slaves. In the case supposed, *the master has fully emancipated his slaves.* In the case before us, *the master has endeavored to clothe his slaves with the uncontrollable and irrevocable power of determining for themselves whether they shall be manumitted.* And in so doing, he has, I think, essayed the vain attempt to reconcile obvious and inherent contradictions.

In considering whether the legislature, in authorizing a master to manumit his slaves by will, could have contemplated, as valid instruments of emancipation, wills, such as the one before us, a view of the many serious difficulties, which from obvious considerations, would most probably grow out of and attend the whole subject of an election by slaves, especially by such of them as might be laboring under the disabilities of infancy, idiocy or lunacy, furnishes, to my mind, a strong argument, in favor of the negative of the proposition. It is difficult to suppose, in the opposite view, that the legislature would not have anticipated such difficulties and made provisions for the regulation of the subject, instead of embarking the chancery courts, without guide, upon a new and extensive jurisdiction, which would needs be fruitful, in litigation of the most perplexing, if not mischievous character.

On the whole, it seems to me, that the provisions of the will, respecting the manumission of the slaves, are not such as are authorized by law and are void, and consequently that the circuit court erred in declaring the slaves and their increase to be free at the death of their life-tenant. * * * * *

Allen, P. and Lee, J. concurred in the opinion of Daniel. Jj. Moncure and Samuels dissented from so much of the opinion as relates to the manumission of the slaves.

ON CONSTRUING STATUTES BY EQUITY.

From the time of Aristotle, as we know by his writings yet extant, and probably from a period more ancient, down almost to this moment, it has been the concurring opinion of all philosophers and lawyers who have delivered their sentiments upon the subject, and a settled doctrine in the jurisprudence of every civilized community, that positive laws or legislative enactments, (except such as are penal, about which there has been some contrariety,) should be construed by equity. The meaning of which is, not that the courts or any class of them, in dealing with any such law, should exercise, or would be justified in asserting, an equitable control over the known intention of the lawgiver—but only that, in the process of ascertaining what is his intention, the spirit rather than the letter of his enactments should be regarded. *Arist. Rhet.* lib. 1, c. 14. *Ethic. Nicem.* lib. 5, c. 10. *Grot. de Jure Bell. et Pac.* lib. 2, c. 16, sect. 26, c. 20, sect. 27; *de Aequitate*, sect. 12; *de Indulgentia*, sect. 4; *Puffend. de Jure Nat. et Gent.* lib. 1, c. 6, sect. 17; lib. 5, c. 12, sect. 21; *de Off. Hom. et Civ.* lib. 1, c. 2, sect. 10; *Elem. Jurs. Univ.* lib. 1, sect. 22, 23; *Tayl. Elem. Civ. Law*, 3rd edit. pp. 90-98: *Ashe's Epieikeia*, Introd.

Blackstone has set this matter in a clear and strong light, in a passage of his commentaries, which is repeated by Tucker *verbatim*, and, with no material alterations, by Stephen and by Story. His words are: "It is said, that a court of equity determines according to the spirit of the rule, and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess to interpret statutes according to the true intent of the legislature. In general laws all cases cannot be foreseen, or, if foreseen, cannot be expressed: some will arise, that will fall without the meaning, though not within the words of the legislator, and others, which may fall within the letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within the equity of an act of parliament; and so cases within the letter are frequently out of the equity. Here, by *equity*, we mean nothing but the sound interpretation of the law;" not that courts of equity (so called) are more trusted or more obliged, than courts of law, to give effect to such an interpretation. "Each endeavours to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single tittle." 3 *Black. Com.* 430. *Tuck. Comm. B.* 3, ch. 21, p. 388, edit. 1837; 4 *Steph. Com.* 2-3; *Stor. Eq. Juris.* sect. 15; see als 1 *Woodd. Syst. View* lect. 7, pp. 192-199, 1st edit.

"In this sense, equity," says Story, (*Equity Juris.* sect. 7,) "must have a place in every rational system of jurisprudence." Yet its ejection out of our own has been attempted.

This attempt is made by Mr. Sedgwick, in his copious, elaborate, and learned treatise on the Interpretation and Application of Statutory and Constitutional Law, which appeared during the last year. He, as we understand him, distributes *quoad hoc* all statutes into two principal classes: one consisting of those, in which the language is clear and plain to such a degree that no two competent judges of mere language could differ about its meaning; the other of those, in which the language is obscure or ambiguous: and this latter class he subdivides into, first, those in which, by the help of what he calls legitimate aids, enumerated in his sixth chapter, a determinate meaning is capable of being affixed to the words used; and secondly, those in which no such meaning can be, through any such help, wrought out. In cases falling within the latter of these subdivisions, (pp. 259, 264, 291, 293, 294, 311, 312, 379, 380,) he ascribes to the judiciary a *quasi*-legislative power, to make a rule where some rule must be applied and the legislature have, in their attempt at framing one, failed; in all other cases of this class, (pp. 230, 235, 258, 294,) he regards the courts as properly fulfilling the office of interpreters and expositors of the law: but in cases of the first class, (pp. 231, 232, 235, 295, 296, 305, 210, 379,) he considers that always, (at least in modern times, and in America, more especially,) where they have applied the doctrine of equitable construction, so as to go one tittle beyond, or to stop one tittle short, of the exact letter of the statute, they have been usurpers of power that did not of right belong to them.

With regard to this last point, which alone we propose at this time to consider, we differ widely from Mr. Sedgwick; as to the ground of his doctrine, utterly; perhaps, as to the results of it, not *toto cælo*. He himself confesses, that herein he stands opposed to, not only the whole body of the civil law and civilians, the best writers, if not all writers, on general jurisprudence, and the whole body of the early and mediæval common law and writers upon it, but also numerous very modern decisions of the courts on both sides of the Atlantic. Of these he cites many, and declares that the number might easily be increased; but he pronounces them all unsound. Pp. 296-306. In contending with one who takes such ground, it seems to be to no purpose to display the vast multitude of decisions which have been made expressly contrary to his doctrine before the time of its being promulgated,—his book is so very recent that probably none can be found since,—yet we cannot refrain from pointing attention to the volume of Ashe, entitled *Epitikeia*, published in 1609;

in which mere references to those passages in the few English law-books then extant, which contain authorities establishing the construction of particular statutes by equity, fill two hundred and fifteen numbered leaves, or four hundred and thirty pages,—sustaining almost to the letter the statements of Plowden, in his note appended to the report of *Eyston v. Studd*, (*Plowd.* 465-467,) “the sages of our law, who have had the exposition of our acts of parliament, have in cases almost infinite restrained the generality of the letter of the law by equity, which seems to be a necessary ingredient in the exposition of all laws,” and that “there are an infinite number of cases in our law, which are in equal degree with others provided for by statutes, and are taken by equity within the meaning of those statutes.” It is upon principle, against all such authority, that the standard of revolt is now reared, and upon *principle* we will discuss the new doctrine, in favour of which the old is thus sought to be displaced.

As introductory to such discussion, it seems expedient to present a more complete analysis and exposition, than has yet been offered, of the latter. The kind of equity, then, which we are considering, is conversant about determining what cases come within the operation of a particular statute, and what is its operation in them, and it either enlarges beyond the letter, or restrains within limits less extensive than it, the scope of the statute, or its operation, or both. Thus it may not be possible, in point of grammatical construction, to make the words of a statute extend so far as to comprehend certain cases, or to produce a certain effect in the cases they do comprehend; yet it may seem, that such cases outside of the letter ought to have the same rule applied to them, as is applied to cases that are within it, and also that such effect is necessary for accomplishing the design of the legislature: or, it may be that the language is so general as to comprehend a variety of cases materially distinguishable in their circumstances, perhaps even contrasted, or to produce an effect beyond what the design of the legislature calls for; and then it may seem, that some of the cases so comprehended ought not to be within the operation of the statute at all; or that its operation ought to be less extensive than the full latitude of its words. Now, between that equity which, on the one hand, enlarges the range of the statute or its efficacy within its true range, and that which, on the other, restricts either, there is this observable difference: All men, knowing what it is they do contemplate, are apt to use words which are large enough to embrace it; but all men, being unconscious necessarily of what they do not contemplate, are liable to employ general words that (literally taken) have a sense more comprehensive than is suited to their present design. Hence, to say that a law does

mean something not expressed in it, is a stronger measure than to say that its general phraseology comprehends not only all which it was intended to mean, but also something not thought of or *de facto* contemplated in making it. In other words, it is less natural to suppose that the legislator has left out some case, which was in his contemplation, and for which he did intend to provide, or has omitted some part of the provision he had meditated, and did design making: than that, from an incautious or unskilful use of general language, he has included in the letter, cases which never were in his contemplation, or has given to the provision he designed making, an amplitude beyond what he ever intended. Restraining equity, therefore, is only a candid interpretation of the lawgiver's language; and merely says, that his words shall operate so far and no further, because he did not mean all they are capable of expressing, *dixit sed non voluit*. Enlarging equity, on the other hand, lies open to the objection, at least plausible, that presumably the legislator did not mean more than he has said, and at any rate, if he meant more, he has not said it; *voluit sed non dixit*; whereas statute law must consist of both the intention and the expression. And thus it, at least, may be said, that while restraining equity is proper, because it merely neutralizes the expression where the intention is absent, enlarging equity can be nothing else than judicial legislation, because it enforces as law that which lacks the requisite expression, if even the intention be not also wanting.

Plowden, in his note before mentioned, after dividing equity into two kinds, and giving a definition and numerous examples of the restraining sort, says "the other kind of equity differs much from the former, and is in a manner of a quite contrary effect;" and then he defines and exemplifies enlarging equity, in such manner as to shew that "cases which are in equal degree with others provided for by statutes, are taken by equity within the meaning of those statutes." We believe that this is the view, which has been generally, perhaps universally, taken of such cases, conformably with the *decantatum*, that "a thing which is within the statute as if it were within the letter." *Bac. Abr. tit. Statute*, I. 5; *Dwarr. Stat* 691, 1st edit.; 15 *Missouri Rep.* 519, *Riddick v. Walsh*. It seems, however, to be of little practical importance, whether in these cases the statute operates directly, or by analogy, in like manner as courts of equity, when not bound by statutes of limitation, have nevertheless applied them where the circumstances were such as that they would have been applicable in a court of law: since, either way, the same end is accomplished, and that natural love of justice in the human heart is satisfied, which so vividly responds to the appeal, "*valeat aequitas. quæ paribus in causis paria jura desiderat*," (Cic.

Top. sect. 4; *Bract.* lib. 1, c. 4, sect. 5, fol. 3 n.; *Co. Litt.* 246;) and to the more homely law-maxim, *ubi eadem ratio ibi idem jus*.

These considerations do not apply to the other species of enlarging equity, relative to the operation of a statute in cases that come within it. That species, indeed, we feel (perhaps as much as half) inclined to surrender to the condemnation of Mr. Sedgwick,—not, however, upon his ground,—but upon the ground which we have indicated before: And therefore it is with reference only to restraining equity, that from this point the discussion will be carried on. This we cannot give up to him.

He condemns and rejects promiscuously all the kinds and species we have been taking pains to distinguish, at least wherever the language of a statute is plain, upon the broad ground that the courts can in no case depart from what is so written; because (as we understand his reasoning) the principles of civil freedom, as now understood in England and here, and the very terms of our fundamental laws in most or all of the States of this Union, require that the legislative and judiciary departments of government shall be distinct, and that neither of them shall exercise the functions of the other. But it seems difficult, and to us is impossible, to conceive how the courts can be more guilty of usurping power that does not belong to them, or how they can be properly said to contain themselves within their own province less, when they diligently seek, and faithfully (to the best of their judgment) execute, the lawmakers' intention, in cases which, according to that distribution of statutes we have ascribed to Mr. Sedgwick, fall within the first class, than when they do the like in cases that fall within either subdivision of the second. On the contrary, we hold with Blackstone, Tucker, Stephen, Story, that in *all* cases it is the duty of a judge "to endeavour to fix and adopt the *true sense* of the law in question, not enlarging, diminishing, or altering *that sense* in a single tittle;" and with Puffendorf, (*de Jure Nat. et Gent.* lib. 1, c. 6, sect. 17;) Taylor, (*Elem. Civ. Law*, 3rd edit. p. 97;) and a host besides, that this equity is not of grace, but of right, not of favour, but of justice, and that the judge who follows out the letter, when he ought to decide according to the spirit, does not less violate the law than he who sets himself above it, and distinguishes where that, rightly understood, has not distinguished. Indeed, Mr. Sedgwick himself repeatedly (pp. 229, 231, 232, 235, 259, 291, 294, 295, &c., &c.) lays it down, that in construing a statute the object to be sought is the intention of the legislature: And therefore the controversy between us seems to be narrowed to the question, whether that intention can be less extensive than the language of the statute, where the language is

plain,—or, to put it in the form most favourable to him, whether it can be sufficiently known to be so. He maintains the negative, (pp. 306-307,) *we the affirmative.*

On an issue like this, the appeal must be to common sense: and therefore, without calling any of the multitudinous witnesses in our favour, as all those are who have made the decisions of this kind reported by Mr. Sedgwick, or have maintained a similar doctrine, we bring the matter at once to that standard. A statute ordains, that if a prisoner confined upon a charge of felony break prison, that shall make him a felon; a prison takes fire, and such a prisoner breaks it to save his life, (*Plowd.* 13, arg. in *Reniger v. Fogossa*;) another statute ordains, that whoever shall do a certain act, shall be a felon and suffer death; a madman, or an infant not yet *doli capax*, does the act, (*Plowd.* 465, note to *Eyston v. Studd.*)—in these cases, is the prisoner, the madman, or the infant, a felon within the meaning of the respective statutes? We suppose that there can be but one answer. *Bac. Abr. tit. Statute*, I. 6. And if in these extreme cases the issue must be decided in our favour, that settles the principle. In other cases it may be more dubious, whether the legislature *have* meant all, or less than all, that is said, but the possibility that they *may* have used words capable of meaning more than they meant, and that this *may* be satisfactorily shewn, cannot, after the preceding instances, be successfully negated.

We think that on this point Mr. Sedgwick is in error, and that the source of his error may be detected by means of what he lays down in p. 280 of his volume. He there says, that in discharging the duty of construing a statute, “the first thing is to have a clear idea of the object in view. What is doubtful? The answer evidently is, the intent of the legislature who passed the act. What did the legislature in fact intend? The doubt does not refer to the *policy* of the act: for with that, as we have seen, the judges have nothing to do. They are judges, and not law-makers. Nor does the doubt regard the *motive* of the legislator, for over that the judges have no right of control.” And from thus compelling them to ignore all that goes to make up the spirit of the statute, it follows necessarily that he must confine them to the mere letter of the law, wherever that can afford any certain rule of decision.

Now we agree with him, that in one sense the judges have nothing to do with the policy of the act. They are (ordinarily) not to judge the law, but to judge by it; “*non de legibus judicare, sed secundum ipsas*,” in the words of the quotation from St. Augustine, with which (p. 228, n.) Mr. Sedgwick favours us. They are, accordingly, not to say that the policy of the statute is good, and therefore they will enlarge its operations, or bad,

and therefore they will narrow it; agreeably to the opinions which in another place (p. 308,) he has collected. And for precisely that same reason they cannot controul the motive. But it is the business of every expositor of a statute to ascertain what in point of fact is the policy, what the motive; in order that the construction which he shall adopt may be neither repugnant to, nor discrepant from, either, but in harmony with both. And this is the course which in a vast majority of instances, if not in all, has been pursued from the earliest dawn of judicature among our ancestors down to a very recent period, if not absolutely to the present time, among their descendants both in England and in America. What else mean those appeals which are now being constantly made, by the judges in our highest state tribunal, when engaged in construing our Virginia Code of 1849, to the reports of the revisors upon which it was founded?

For the reasons which have been thus shortly and imperfectly stated, we should think that, upon principle, if the matter were *res integra*, the doctrine thus handed down to us *ab antiquo* is that which ought still to prevail. But upon the ground of authority the question is most important, if it can be regarded as a question at all, whether the courts are at liberty now to discard it in favour of even a better. Are they not under the same obligation in this matter, as in others, *stare decisis*? And is not the rule of interpretation, according to which statutes have been construed in innumerable cases heretofore, to be considered as a thing *decided* in every one of those cases? Moreover, is it not due to the legislature to suppose, that they rely upon having their words interpreted with the same candour, construed with the same equity, that has always heretofore been applied under like circumstances? And, upon all these considerations combined, if the judges are to wheel—(military men, we believe, call it *facing*)—short to the right about, ought not they to wait for a signal in the shape of some fresh constitutional provision,—more especially seeing with what ease and rapidity constitutions in our day chase one another across the stage,—instead of performing that evolution at the word of command of a text-writer, or (worse still) *sua sponte*.

In the remainder of this article we shall advert to some of the most recent authorities, not mentioned by Mr. Sedgwick, that are favourable to our view; and then notice those which he cites as adverse to it.

In January 1855, a case (*Hawkins v. Gathercole*, 31 *Engl. L. and E. Rep.* 205,) was decided by the Lords Justices in England, who concurred in holding, that a subject matter confessedly within the words of a *modern* statute, made in the reign of

Victoria, was not within its operation: and upon that occasion one of them, Sir George James Turner, used these expressions: "That [the particular subject matter in dispute is] within the words of the act, if literally construed, cannot of course be disputed, but in construing acts of parliament the words which are used are not alone to be regarded; regard must also be had to the intent and meaning of the legislature. The rule upon this subject is well expressed in the case of *Stradling v. Morgan*, in *Plowden's Reports*, in which case it is said, at p. 204. "The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded acts which were general in words, to be but particular where the intent was particular? And after referring to several cases, the report contains the following remarkable passage at p. 205:—"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and the necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion? The same doctrine is to be found in *Eyston v. Studd*, in the same Reports, p. 465, and the note appended to it, and many other cases. The passages to which I have referred, I have selected as containing the best summary with which I am acquainted of the law upon this subject. In determining the question before us we have, therefore, to consider not merely the words of the act of parliament, but the intent of the legislature to be collected from the cause and necessity of the act being made; from a comparison of its several parts; and from foreign meaning [matter] and extraneous circumstances, so far as they can justly be considered to throw any light upon the subject." And in a later case, (*Crofts v. Middleton*, 35 *Eng. L. and E. Rep.* 466, decided in March 1856,) the same passage from *Stradling v. Morgan*, was incorporated into a very learned judgment of the other Lord Justice, Sir James Lewis Knight Bruce: who took occasion to copiously illustrate a proposition he then advanced, and which he had some three years before ad-

vanced in another case, (*Key v. Key*, 19 *Eng. L. and E. Rep.* 624,)—"leges non ex verbis, sed ex mente, intelligendas."

In like manner, it was said by one of the greatest of our American judges, Chief Justice Shaw of Massachusetts, in June 1834, (15 *Pick.* 393, 402, *Brown v. Thorndike*;) "Without at present stopping to state the rules of construction, which are familiar and uncontested, and which mostly result in considering the various means, by which the intent of the legislature, in the act they have made, can be discovered, it is well established, that in the construction of remedial statutes, [by which we understand, in such connection, all that are not penal,] cases not within the letter of the statute are taken to be within its spirit and equity, upon a reasonable certainty, arising from consideration of the statute and of every part and clause of it, and from the obvious end and purpose to be accomplished by it, that it was so intended by the legislature; and also that a case may come within the letter, which shall not be judicially construed to be within the act, because it is alike manifest, to a reasonable certainty, that it was not so intended by the makers of the act." And accordingly the following, among very many other equally strong, decisions have been made under our republican constitutions.

Where the words of a statute gave to a court equitable jurisdiction in "all cases of trust arising under deeds, wills, or in the settlement of estates;" it was nevertheless held, upon general reasoning as to the spirit and policy of the statute, that the jurisdiction so given extended only to express trusts arising from the written contracts of the decedent, and not to those implied by law, or growing out of the official character or situation of his executor or administrator. 5 *Greenl.* 303, *Given v. Simpson*. So, upon a statute enacting, that "any child or children, or their legal representatives in case of their death, not having a legacy given him, her, or them in the last will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though said parent had died intestate: provided such child, children, or grandchildren, have not had an equal proportion of the deceased's estate bestowed on him, her, or them, in the deceased's lifetime," it has been settled by repeated decisions, that in order to exclude an unadvanced child or other descendant from a distributive share of the testator's estate, it is not necessary that such child or descendant should have anything given him or her by the will, but it is sufficient if it appears from the will, by such child or descendant being named therein, (1 *Mass. Rep.* 146, *Terry v. Foster*; 2 *Mass. Rep.* 570, *Wild v. Brewer*; 3 *Mass. Rep.* 17, *Church v. Crocker*;) or by any other sufficient indication, (14

Mass. Rep. 357, *Wilder v. Goss*; 2 *N. Hampsh. Rep.* 499, *Merrill v. Sanborn*;) that he or she was not forgotten by the testator at the time of his making it. 18 *Picker.* 166-167, *Tucker v. Boston*. So,—finally, not to multiply, as we might easily, citations of this sort *usque ad nauseam*,—upon statutes enacting, that “no bargain, sale, mortgage, or other conveyance, of houses or lands, shall be good and effectual in law to hold such houses or lands against any other person or persons, but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded;” or that “no conveyance of a freehold in, or lease for a longer term than seven years of, any land shall be good and effectual in law to hold such land against any person but the grantor and his heirs, unless the deed of conveyance be acknowledged and recorded, (3 *Mass. Rep.* 573-583, supplement; 2 *Mass. Rep.* 508, *Norcross v. Widgery*; 4 *Mass. Rep.* 545 546, *Pidge v. Tyler*; 637, *Farnsworth v. Childs*; 5 *Mass. Rep.* 450, 457, 459, 469, 477, *Dudley v. Sumner*; 6 *Mass. Rep.* 29-30, *Marshall v. Fisk*; 487, *Davis v. Blunt*; 10 *Mass. Rep.* 62, *Prescott v. Heard*; 407-408, *Commonwealth v. Dudley*; 11 *Mass. Rep.* 158-159, *Brown v. Maine Bank*; 14 *Mass. Rep.* 300, *Connecticut v. Bradish*; 1 *Pick.* 164, *Priest v. Rice*; 3 *Pick.* 152-153, *McMechan v. Griffing*; 4 *Greenl.* 20, 26, 27, *Porter v. Cole*; 8 *Greenl.* 99-100, *Hewes v. Wiswell*;) or that “every deed not recorded shall be adjudged fraudulent and void against a subsequent purchaser for valuable consideration, whose deed shall be recorded,” (10 *Johns. Rep.* 457, *Jackson v. Burgott*; 17 *Wend.* 25, *Van Rennsellaer v. Clark*;) or that “all deeds, relating to” certain descriptions of lands, shall be deemed “fraudulent and void against a subsequent purchaser for a valuable consideration, unless first recorded,” (9 *Johns. Rep.* 163, *Jackson v. Sharp*;) or that “all leases of” certain other descriptions of real estate, “and all transfers thereof, shall be recorded within twenty-four hours after the execution thereof, at the expense of the lessee or assignee, and in default thereof the same shall be void,” (10 *Johns. Rep.* 466, *Jackson v. West*;) it has been held, in Massachusetts, Maine, and New York, that such deeds unrecorded are, as against the grantors and subsequent purchasers from them with notice, in all respects and in all courts as valid as if they had been duly recorded. See also, in Pennsylvania, 1 *Dall.* 430, *Levinz v. Will*; 4 *Dall.* 153, *Stroud v. Lockhart*; 4 *Binney* 140, 146, *Correy v. Caxtan*; 7 *Watts* 261, *Jacques v. Weeks*; 7 *Watts* and *Serg.* 335, *The Manuf. and Mechan. Bank v. The Bank of Pennsylvania*; 5 *Barr* 473, *Solons v. McCullough*. And here it may be remarked, as somewhat curious, that Mr. Sedgwick has ignored all these decisions, though several of them

were in his own State, in that part of his book, (pp. 320-321,) where he notices a contrary decision of the court of King's Bench in England, (5 *Barn. & Ald.* 142, *Doe v. Allsop*,) upon similar words of a statute there; a decision, too, which possibly would not have been made, if it had not been settled long before, in regard to that very statute, that a court of equity would uphold the first deed, though unregistered, against such a subsequent purchaser. (4 *Bro. P. C.* 2nd edit. 189-190, *Forbes v. Deneston*; 1 *Str.* 664, *Cheval v. Nichols*; 2 *Eq. Abr.* 63, *S. C.*; 1 *Eq. Abr.* 358, *Blades v. Blades*: 357-358, *Beatniff v. Smith*; 3 *Atk.* 646, *Le Neve v. Le Neve*; 1 *Ves. Sen.* 64; *Ambl.* 436; 2 *White and Tud. Lead. Eq. Cas.* 21, *S. C.*; *Ambl.* 624, *Sheldon v. Cox*; 2 *Eden.* 224, *S. C.*; 1 *Burr.* 474, *Worseley v. De Mettos*; 2 *Ld. Keny.* 226, *S. C.*; *Cowp.* 712, *Doe v. Routledge*; 2 *Ridgew. P. C.* 345, 428, 429, *Chandos v. Brownlow*; (*Scho. and Lefr.* 98-100, *Bushell v. Bushell*; 1 *Ball and Beat.* 290, 301, 303, *Eyre v. Dolphin*).

On the other hand he has collected (pp. 231, 243, 247, 260, 261, 307, 311,) some decisions and more *dicta*, which, as stated by him seem to have a tendency towards his side of the question. These it was not necessary, with his views,—which we have already noticed as blending promiscuously the different kinds and species of equity,—to reduce under any collocation or arrangement, having reference to those several kinds and species; but we shall endeavour to marshall them in an order more suitable to the present discussion. And, first, of those which concern restraining equity: The cases he cites, in which unavailing attempts have been made at applying it, are (in his order of mentioning them) *Bosley v. Mattingly*, 14 *B. Mon.* 89; *Fisher v. Blight*, 2 *Cranch* 358; *Case v. Wildridge*, 4 *Indiana Rep.* 51; *Notley v. Buck*, 8 *Barn. and Cr.* 467; *Rex v. Stoke Damerel*, 7 *Barn. and Cr.* 563; *Rex v. Ramsgate*, 6 *Barn. and Cr.* 712; *Rex v. Barham*, 8 *Barn. and Cr.* 99; *Green v. Wood*, 7 *Ad. and Ell. N. S.* 178; *Rex v. Burrell*, 12 *Ad. and Ell.* 460; *Lamond v. Eiffe*, 3 *Ad. and Ell. N. S.* 910; *Everett v. Wells*, 2 *Scott's N. R.* 525; *Newell v. The People*, 3 *Seld.* 9; *Bidwell v. Whitcher*, 1 *Michig. Rep.* 469; *Commonwealth v. Kimball*, 24 *Pick.* 370; *MeIver v. Ragan*, 2 *Wheat.* 25; *Moss v. Commissioner of Sewers*, 4 *Ell. and Bl.* 670; *Putnam v. Longley*, 11 *Pick.* 487; *Gore v. Brazier*, 3 *Mass. Rep.* 523; *Landon v. Potter*, 3 *Mass. Rep.* 215; *Priestman v. The United States*, 4 *Dall.* 28, 39, n.; and upon a careful examination of them all, we are prepared to make and maintain the assertion, that there is not one of the whole number, in which the decision conflicts at all with the principle already stated, as that which seems to us to be sound. In many

the attempt was preposterous ; in the rest unsustainable, because there did not (though sometimes a dissenting judge thought there did) exist any sufficient reason for supposing, that the legislature had not meant precisely what it had said. Of course, we *can* not, within our necessary limits, exhibit even a brief analysis of *each* of these cases, and therefore we *shall* not in regard to *any* ; but we must notice some of the more remarkable *dicta* which Mr. Sedgwick has extracted from them : Premising the rather obvious general remark, that where occasion does not require a judge to define accurately the position he lays down *obiter*, it is easy for him to fall into some carelessness of expression ; and another general remark as important, and hardly less obvious,—which will receive an immediate illustration,—that even good reporters cannot be trusted implicitly to give us the very words or the precise sense of what does so fall from the judges.

Mr. Sedgwick (p. 246) tells us, from Scott's report of *Everett v. Wells*, that Tindal, C. J., therein said,—“ it is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing.” But we can find, in the report of the same case of Manning and Granger, (vol. 2, pp. 269-279,) no trace of such a *dictum*, but this : “ It is our duty neither to add to nor take from a statute, unless we see good grounds for thinking that the legislature intended something which it has failed precisely to express.”

In another place (p. 308) he quotes Chief Justice Shaw as saying, “ the decisive answer is, that the legislature has made no such exception. If the law is more restricted [restrictive] in its present form than the legislature intended, it must be regulated by legislative action.” But in the report at large of the case, (*Commonwealth v. Kimball*, 24 *Pick.* 366,) which related to an unlicensed sale of spirituous liquor, attempted to be taken out of the operation of a statute prohibiting it, on the ground that it was sold to be used as medicine, we find, between the two sentences culled and juxtaposed by Mr. Sedgwick, the following : “ It does not allude to the object or purpose, for which it is bought. Nor is it reasonable to imply any such exception, because, having provided that it should be lawful to sell spirits in a certain mode, there was no occasion for making an exception ; and such exception would lead to evasion and abuse. It might be bought for one purpose and used for any and every other ; and the danger to be apprehended from the abuse of it would require restriction and regulation, as well in one case as the other.” Corrected thus, and still more if read with the entire context from which it is torn, the quotation will no longer have the appearance, which it otherwise has, of making the truly learned and able Chief Justice throw some discredit on a doc-

trine which (as we have pointed out) he had himself advanced not long before.

In another place (pp. 309-310) he quotes "the Supreme Court of the United States" as *saying* what was only said (if said in those words at all) by Judge Chase in the Circuit Court, whence the case afterwards came into the Supreme Court: And in the latter nothing of the kind was uttered, but the case was decided upon a ground that would have made any such *dictum*, most gratuitous. 4 Dall. 28-34, *Priestman v. The United States*; 31, note 1, S. C. in the Circuit Court.

With like want of accurate statement, he tells us, (p. 231,) "it is said, by the Supreme Court U. S.: 'Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction;'" whereas these are the words of Judge Washington, (9 Cranch 399, *Fisher v. Blight*; 1 Wash. C. C. Rep. 7, S. C. ;) in a *dissenting* opinion,—he standing alone against the rest of the court. Moreover, in the next sentence following these words, he says: "But if, from a view of the whole law, or from other laws *in pari materia*, the evident intention is different from that literal import of the terms employed to express it in a particular part of the law, that intention should prevail, for that in fact is the view of the legislature." A little further on, he says: "If the literal expressions of the law would lead to absurd, unjust, or inconvenient consequences, such a construction should be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done." And from the sequel of his opinion it appears plainly, that by *giving effect* he meant giving *some*, not *full*, effect. In the cases cited by Mr. Sedgwick (p. 231) from 14 B. Monr. 89, and (p. 247) from 1 Michig. Rep. 469, as the words were susceptible of "but one interpretation,"—"but one construction,"—it was necessary to give that construction, in order that they might have *any* effect.

Lastly (under this head) he tells us, (p. 260,) "in an early case, (5 Rep. 118, *b. Edrick's case*,) the judges said, 'They ought not to make any construction against the express letter of the statute, for nothing can so express the meaning of the makers of an act, as their own direct words; for *index animi sermo*.'" But in the original is immediately added: "And it would be dangerous to give scope to make a construction in any case against the express words, *when* the meaning of the makers doth not appear to the contrary, *and when* no inconvenience will thereupon follow; and therefore in *such* cases *a verbis legis non est recedendum*." Which brings that passage of Sir Edward

Coke's writings, (for the words of the report are undoubtedly his,) into harmony with the other authorities of that age, and even with the quotation from Lord Wensleydale, formerly Mr. Baron Parke, which (in the same page) Mr. Sedgwick gives us.

The other authorities which he cites in support of his own view relate to enlarging equity; they therefore do not make against us, within the limits to which we have expressly narrowed the present discussion. Indeed, we do not know that we shall differ from him about one species of that kind of equity, when we shall have fully made up our mind respecting it. But this is certain; for the reasons which have been already mentioned; that all authorities which support that equity do necessarily *a fortiori* sustain the kind we have been advocating. And therefore we shall bring this article to a close with a citation of some of the cases of that description to be found in our Virginia reports; purposely confining the range of selection within a period that is recent.

Of this kind seems to be the case of *The Bank of the United States v. The Merchants Bank of Baltimore*, 1 Rob. Va. Rep. 573; at any rate, in the opinion which Judge Allen delivered in it, he shews that such are the cases of *Williamson v. Bowie*, 6 Munf. 176, and *Peter v. Butler*, 1 Leigh 285. Of this kind also, beyond doubt, is the case of *Green v. Thompson* upon one point of it, 1 Patt. and H. 427, 458. And so too is the case of *The Commonwealth v. Adcock*, 8 Gratt. 661; which being as strong as any that can be conceived, we shall therefore state somewhat at large. A statute (C. 1849, ch. 208, sec. 86,) provides, that "every person charged with felony, and remanded to a Superior Court for trial, shall be forever discharged from prosecution for the offence, if there be three regular terms of said court, after his examination, without a trial; unless such failure to try him was caused by his insanity; or by the witnesses for the Commonwealth being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance or of the inability of the jury to agree in their verdict. Adcock, in due time after his being remanded, was indicted, tried, and convicted; but, at his instance, the verdict was set aside for a variance; and, at a subsequent court, a *nolle prosequi* being entered on that indictment, another, for what was really the same offence, was presented and found; upon which being arraigned, he demanded his discharge under the statute: And it was, on all hands agreed, that unless its operation was excluded by the proceedings on the former indictment, his demand must be granted. On the question whether such

was the effect of those proceedings, the judges of the General Court were not unanimous, but all of them save one maintained the affirmative. In delivering the opinion of the majority, and after adverting to the position of the prisoner's counsel, that the statute must be literally construed, "*ita lex scripta*,"—Judge Thompson said: "By adopting the construction contended for, we should in truth be adhering to the letter and sticking in the bark, [*Plowd.* 467, note to *Eyston v. Studd. Co. Litt.* 546, 283 b, 365 b, 381 b: *Wing. Max.* 9, 21, *Bac. Abr. tit. Statute*, J. 5,] we should violate the first rules of construction, as much as would he who should decide, that the law mentioned by Puffendorf, [*de jure Nat. et Gent.* lib. 5, c. 12, sect. 3,] which forbade a layman to lay hands on a priest, not only applied to him who hurt a priest with a weapon, but to him who laid hands on him for the purpose of doing him some office of kindness, or rendering him aid and assistance—or that the Bolognian law mentioned by the same author, [*Ibid*, sect. 8,] which enacted that whoever drew blood in the streets should be punished with the greatest severity, extended to the surgeon who opened the vein of a person that fell down in the street with a fit,*—or that, in the case put by Cicero, or whoever was the author of the treatise inscribed to Herennius, [lib. 1, c. 11,] cited by Blackstone, [*Comm.* vol. 1, p. 61,] as illustrative of a construction of law by its reason and spirit, the sick man was entitled to the benefit of the law, (upon the vessel's coming safely into port, though his remaining was the result of inability from sickness to escape, which law provided that those, who in a storm forsook the ship, should forfeit all property therein, and the ship and lading should belong entirely to those who staid in it. The result of an extended discussion, conducted upon this principle, is stated by him in these words; "The truth is, the statute never meant, by its enumeration of exceptions, or excuses for failure to try, to exclude others of a *similar* nature or *in pari ratione*, but only to enact, if the Commonwealth was in default for three terms without any of the excuses for the failure enumerated in the statute, or such like excuses *fairly implecable by the courts from the reason and spirit of the law*, the prisoner should be entitled to his discharge." And thus, in a criminal prosecution, a statute made in favor of *liberty*, was re-

* The words of Puffendorf, in an English dress, are as follows: "At Bologna it was enacted, that *whosoever drew blood in the streets should be severely punished*, upon which law a barber was indicted for opening a vein in the street, and it had like to have gone hard with him, because it was added in the statute, that *the words should be taken precisely, without any interpretation*."

strictive to an operation *within*, by the courts *enlarging* exceptions to it *beyond* the letter of the law.*

W. G.

Richmond.

* See also 1 *Virg. Cas.*, 319, *Thompson's case*. 2 *Virg. Cas.* 74, *Lovett's case*, 132, 162; *Vance's case*, 363; *Santee's case*, all cited and commented on by Judge Thompson, 8 *Gratt.*, 679. And, upon the general subject, besides the authorities collected by our contributor, see 5 *Mass. Rep.*, 380, 387, *Pease v. Whitney*, 7 *Mass. Rep.* 523, 524, 526, supplement. 12 *Mass. Rep.* 383, 384, 387; *Somerset v. Dighton*, 14 *Mass. Rep.* 92, 93, *Whitney v. Whitney*; all of which are strong authorities in support of his view. The paper in 7 *Mass. Rep.* was a response, signed by three of the judges (successively Chief Justices,) to a call of one House of the Legislature, according to a practice common in that state, and it contains these expressions: "The constitution is law, the people having been the legislature, and the several statutes of the commonwealth, enacted pursuant to the constitution and law, the senators and representatives being the legislators. But the provisions of the constitution, and of any statute, are the intentions of the legislature [legislators] thereby manifested. These intentions are to be ascertained by a reasonable construction, resulting from the application of correct maxims, generally acknowledged and received. Two of these maxims we will mention. 1. That the natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature, unless the intention, so resulting from the ordinary import of the words, be repugnant to sound acknowledged principles of national policy. And [2] if that intention be repugnant to said principles of national policy, that the import of the words ought to be enlarged or restrained, so that it may comport with those principles, unless the intention of the legislature be clearly and manifestly repugnant to them: for, although it is not to be presumed that a legislature will violate principles of public policy, yet an intention of the legislature repugnant to those principles clearly, manifestly, and constitutionally expressed, must have the force of law. In consequence of the application of these maxims, similar expressions in different statutes, and sometimes in the same statute, are liable to, and indeed do, receive different constructions, so that the true intent of the legislature may prevail. Now, we assume as an unquestionable principle of sound national policy in this state, that, as the supreme power rests wholly in the citizens, so the exercise of it, or of any branch of it, ought not to be delegated by any but citizens, and only to citizens. It is, therefore, to be presumed that the people, in making the constitution, intended that the supreme power of legislation should not be delegated but by citizens. And if the people intended to impart a portion of their political rights to aliens, this intention ought not to be collected from general words, which do not necessarily imply it, but from clear and manifest expressions which are not to be misunderstood. But the words "inhabitants" or "residents" may

comprehend aliens, or they may be restrained to such inhabitants or residents who [as] are citizens, according to the subject matter to which they are applied. The latter construction comports with the general design of the constitution." And, after some further reasoning upon the subject, "It may, therefore, seem superfluous to declare our opinion, that the authority given to *inhabitants* and *residents* to vote, is restrained to *such* inhabitants and residents as are *citizens*. This construction, given to the constitution, is analogous to that given to several statutes. Creditors may levy their execution on the lands of their debtors, and hold them in fee simple, unless redeemed; although the words of the statute are general, yet they are not deemed to include alien creditors: if they were so deemed, then, under color of a judgment and execution, the rule of the common law, prohibiting an alien from holding lands against the commonwealth, would be defeated. So a general provision is made for the dower of widows: yet it is not supposed that a woman, who is an alien, can claim, and have assigned to her, dower in the lands of her deceased husband." [See 1 *Lom. Dig.* 1st edit., 80. For a like illustration upon the Virginia statutes of descents, compare V. L. 1794, 1803, 1814, c. 93; V. C. 1849, c. 123, and see 2 *Rand.* 276, *Barzezas v. Hopkins.*] The case in *Mass. Rep.* turned upon the construction of a statute in these words—"all persons, citizens of this Commonwealth, who, before the 10th day of April 1767, resided or dwelt within any town or district in the then province of the Massachusetts Bay for the space of one year, not having been warned to depart therefrom according to law, shall be deemed and be taken to be inhabitants of the same town or district to every intent and purpose whatever; and it was held that, comprehensive as they were, they did not embrace the case of a minor, though illegitimate: because the court could "never presume it to have been the intention of the legislature to remove infant children from the custody and protection of their parents, or to separate even bastards, while minors, from their mothers—12 *Mass. Rep.* 385, 387. And Wilde, J., in delivering the opinion of the court, said that "by a literal construction" the pauper, "although a minor, must be considered as having gained a settlement;" "but, in the exposition of statutes, such a construction should be given as will best effectuate the intention of the makers. [*Bac. Abr. tit. 1, Statute J. 5, 2 Call 467, Wallace v. Taliaferro.*] In some cases the letter of a statute may be restrained by an equitable construction; in others enlarged; and in others, the construction may be even contrary to the letter. *Bac. Abr. tit. Statute, I. 6, 2 Call 457, Wallace v. Taliaferro, 403, Browne v. Turberville.*] For a case may be within the letter, and not within the meaning of a statute. *Bac. Abr. tit. 1 Statute, ; 5, Plowd, 467, Eyston v. Studd."*

WILL. IMPLIED MANUMISSION OF SLAVES.

Brooks' adm'r v. Brooks.

Supreme Court of Appeals of Virginia, January term, 1852.

Manumission of slave by will may be implied from the language thereof, though no express terms of manumission are used.

In this case Mary Ann Brooks, a negro, petitioned the Judge of the Circuit Superior Court of law for the county of Henrico, and the city of Richmond—at the Fall Term 1851, thereof—under the act Code of Virginia, ch. 107, p. 464, for leave to sue for her freedom, representing that she was detained as a slave in the custody of the administrator of Moses Brooks deceased, her reputed father, a free negro. Upon an inspection of the petition, it was allowed and A. J. Crane assigned as her counsel, but before process issued, the counsel was required to make an exact statement to the Court of the circumstances of the case, with his opinion thereon; and the Judge of the court (Hon. Wm. W. Crump) being so situated with respect to the matter, as to render it improper for him, in his opinion, to sit upon the trial of the same, it was ordered that the suit be transferred to the Judge of the Circuit Court of Chancery for the county of Henrico, (Hon. John Robertson, Judge) to be tried. A statement of the case having been made and the opinion of counsel submitted, upon the trial of the cause, the following statement of facts was agreed by counsel, to be received as evidence before the jury, except so far the same or any part thereof should be excluded by the court, as not admissible as legal evidence.

“It is expected to be proved, by Quintain Blain, that he knew Moses Brooks, the father of the petitioner in 1818, that he was then a free man of color. That it was the common rumor, at the time, that the said Moses had purchased and set free the mother of the petitioner and two other children, Rachel and Beverly, before their birth. That he had two other children, slaves, (not included in the said purchase. That the witness had known the petitioner ever since 1818. That she came into his employment, in January 1826, and had remained in his employment until within a few months previous. That she always lived as a free woman during all this long period. That he paid her the price of her hire, and never to any one else. That it was never demanded by any one else. That he had never heard any doubt of her freedom until recently. That she lived thus independently of her father (who died fourteen years ago) whose administrator or the curator of whose estate now holds her.

That he never heard of Moses Brooks claiming her, in his lifetime, as a slave, or of any one else doing so, until recently. That Rachel and Beverly, the two children of Moses Brooks, before named were also considered free.

It is also expected to be proved, by Thomas Harris that he has known the petitioner for more than twenty five years. That in 1839 he rented her a house, made the bargain with and received the money from her. That she has always passed as free, since known to him. The sister of petitioner Rachel, before named, has also been registered as free.

It is also expected to be proved by Susan Brooks, second wife and widow of Moses Brooks, (whose testimony is supposed to be competent against the estate of a colored man, whose heirs are all colored,) that Moses Brooks always said that he had purchased the mother of the petitioner, that he always said he intended his children to be free and so stated at the time of his death and desired her to see that they were sent out of the State at his expense, and that petitioner had always lived and passed as free."

Brooks left a will, containing the following clause, the only one mentioning Mary Ann Brooks: "It is my wish and desire that if I, or my executor, should recover from Jasper Crouch, my grandson, Peter Willis, by suit, that he should be hired out for ten years from the time he is recovered, and that one half his hire should go to his mother, Mary Ann Brooks." The will further directs the executor (Dr. Wm. Minton) to send testator's three grandchildren, Peter Willis the son of petitioner, being one, to a free State, at his expense.

"It is further expected to be proved, that Dr. Wm. Minton, the executor, wrote the will at the dictation of Brooks, was familiar with his wishes and attempted to affectuate them.

"The attestation of the will shows that Minton qualified as executor on the 1st December 1834. It is expected to be proved that Minton, up to the day of his death, never claimed petitioner as the property of Brooks, never subjected her as assets, nor hinted that she was a slave, never claimed her hires or controlled her in any other way, but on the contrary, kept an account with her as devisee, under the will of Moses Brooks. That he dealt with the other children of Brooks, standing in precisely the same relation to Brook's estate, as petitioner, as free persons, and purchased from them their several interests in the estate of their father. That he offered to purchase the interest of petitioner, but she declined to sell. That Minton, the executor, died within three or four years past. In his will he no where expressly sets any of his children free, but gives them all legacies.

It is further expected to be proved that the only distributees

of Brooks' estate, now unadministered, are Susan Brooks, his widow, (whose lawful marriage and consequent right to distribution is doubtful,) who disavows any claim to Moses Brooks' children as slaves, and the petitioner and other children of Moses Brooks and their children. That there are no debts due by Brooks' estate, known to his personal representatives. That there is no record evidence that Brooks had set free either petitioner or the other children of his first wife."

The defendant moved to exclude from the jury that portion of the statement in which is contained what is expected to be proved by Quintain Blain, but the court admitted all of that portion of said statement, except this passage, "That it was the common rumor at the time that the said Brooks had purchased and set free the mother of the petitioner," to which ruling of the court, the defendant excepted. The defendant also objected to the statement of what the defendant expected to prove by Thomas Harris, but the court overruled the objection and admitted that portion of the statement, and the defendant again excepted. He also objected to the introduction of that portion of the statement which contained what was expected to be proved with regard to Dr. Minton, but the court overruled this objection and the defendant again excepted. He also objected to the introduction of that part of the statement showing who are the distributees of Moses Brooks' estate. This objection was also overruled and exception taken. The evidence of Susan Brooks was waived.

There being no other evidence, the defendant, by his counsel, demurred to the plaintiff's evidence, and there was joinder in demurrer. The jury found for the plaintiff, subject to the opinion of the court on the demurrer.

Crane, for the plaintiff, argued 1st, that by lapse of time, the right of the defendant to take possession of the plaintiff had been tolled, the recognition by the defendant's intestate and the defendant himself, for so long a period, of the plaintiff's freedom, barred a recovery. 2nd. It was contended that the legacy to the plaintiff, carried with it, all the incidents to its enjoyment, one, and the most essential of which, was freedom, and that therefore though the plaintiff was not directly and in terms manumitted by the will, there was an implied manumission.

R. T. Daniel and Roy, for defendant, insisted that there were but two modes of emancipation known to the law of Virginia, by deed or by will. It was not contended that there was any deed of record. As to the will, there is no word in it which expresses a present intention to emancipate the petitioner. It gives her a

legacy, and it may be said a slave can not take one. But that bequest is reconcilable with the supposition that the testator regarded her as already free—and indicates no intention then to emancipate. Her son Peter Mills, it might be gathered from the will was then in slavery. This repels the presumption that the mother, at his birth was free. The direction in the will that Peter Mills, if recovered, shall be sent to a free State, is an implied emancipation of him, and shows that with the mother and child, both in contemplation at the same time, he emancipates the child and leaves the mother in bondage. The freedom of the respondent must be inferred, if at all, from the fact merely that a legacy is given her. Now the grant of freedom is said to be one of the highest acts of sovereignty. To infer the performance of such an act from the simple conferring of a benefit, upon a slave, and the slave's incapacity to take it, would be a conclusion unwarranted by reason or judicial precedent.

ROBERTSON, J., overruled the demurrer to plaintiff's evidence, and judgment was entered up for plaintiff, with costs.

Isaac A. Goddin, the administrator of Moses Brooks, thereupon presented his petition to the Supreme Court of Appeals for a supersedeas to the judgment of the court below, but the Court of Appeals unanimously refused to grant the writ of supersedeas, and entered the following order:

February 7th, 1857.

Present, ALLEN, BALDWIN and DANIEL, Jj.

“The petition of Isaac A. Goddin, administrator of Moses Brooks, dec'd, for a writ of supersedeas to a judgment, recovered against him by Mary Ann Brooks, in the Circuit Court of law for the county of Henrico, on the 26th day of January 1852, having been maturely considered and the transcript of the record of the said judgment seen and inspected and the court being of opinion that there is no error in the said judgment, doth deny the said writ of supersedeas.”

LIEN OF THE FI. FA

Marshall v. Goad.

Circuit Court of Carroll County, Va., March Term, 1858.

The lien of a *fi. fa.* on goods and chattels does not continue beyond the return day, if no levy has been made.

An execution is placed in the officer's hands, and is not levied and after the return day another execution issues and is levied; the lien of the first writ is gone and the property is liable to the second writ.

Edmund Marshall sued *Reuben Goad* in the County Court of Carroll. At the March Term 1858, the defendant appeared, and the parties agreed a case in effect as follows.

That the defendant is a constable of Carroll county. That on the 6th day of October 1857, *Hutsell* and *Marshall* sued out of the clerk's office of the County Court of Carroll, two executions against *John Monday* and *W. Scott*. These executions were upon judgments on forfeited forthcoming bonds, taken by the defendant, and were directed to him. They were for small sums, amounting together to not quite \$30. They were directed to defendant and placed in his hands on the 6th Oct. 1857. They were made returnable on the First Monday in November, 1857. Those executions were never levied on any property. On the 19th day of December, 1857, *J. T. Earhart* sued out of the same office an execution against the said *Monday* and *Scott* for \$13 95, with interest and costs; and that execution was also directed to the defendant, and was placed in his hands on the day of its date; and on the 29th day of December, 1857, he levied it on a mare, the property of *Monday*. On the 9th day of January, 1858, the plaintiff, *Edmund Marshall* sued out from under the hand of a justice of the peace, an execution against the same *John Monday* for \$29 10, with interest and costs. On the 18th day of January that execution was placed in the hands of *Nester*, another constable; and on the 23rd January, *Nester* levied that execution on the same mare on which the defendant had levied *Earhart's* execution; and the defendant had notice of that levy. On the 1st day of February, 1856, the defendant sold the mare, in the manner prescribed by law, and the proceeds of sale amounted to \$55. Out of this sum the defendant paid off *Earhart's* execution, amounting with costs, to \$18 26, leaving in his hands the sum of \$36 74 of the proceeds of the sale of the mare. The plaintiff required the defendant to apply this money to the plaintiff's execution; but the defendant refused so to do; and leaving *Hutsell* and *Marshall's* executions still in his hands, he endorsed them "satisfied," and paid over the money to them. Now, if upon these facts the lien of *Hutsell* and *Marshall's* was lost as to the mare,

then the plaintiff is to have judgment against the defendant for the amount of his execution; but if that lien was still in force at the time of the sale, then the plaintiff's suit is to be dismissed. By consent the case was removed into the Circuit Court, and at March Term came up for decision.

Cook for plaintiff.

McCamant for defendant.

The counsel commented upon the various statutory provisions on the subject, and upon the case of *Puryear v. Taylor*, 12 Grat., 401.

FULTON, J.

This case does not involve much money, but it distinctly presents a question which has excited much enquiry and consideration, and upon which I have bestowed much reflection. It is an important, interesting and difficult question, and one which must often arise, if the defendant's view be correct. That question is whether the lien of a *feri facias* continues beyond the return day, as upon goods and chattels upon which no levy has been made.

At the outset I am told that the question has been decided; and that under the authority of the case of *Puryear vs. Taylor*, I am required to hold that the lien does continue beyond the return day, as against property upon which a levy might have been but was not made. I do not agree to this. I do not think that *Puryear vs. Taylor* decides any such thing. That decision I would not question, even if it were discreet for me so to do; for I have no doubt of its correctness. But I think it has no application to this case. *Puryear vs. Taylor* involved the effect of the lien of a *fi. fa.* upon a *chose in action*. It had nothing to do with *goods and chattels*. The question in that case arose, and could only arise under chapter 188 of the Code: that chapter, in my opinion has no effect at all upon this case. It is true that the reporter, in his syllabus of the case, uses language broad enough to apply to goods and chattels; and I confess that his statement led me, for a time, to entertain an opinion different from that which I now hold; and it was not till I had carefully re-examined the case that I became satisfied that its scope was much less comprehensive than it was stated to be. I do not, therefore, think myself governed by that case, in this instance; and must decide the question at bar, as I best may, without the benefit of any authority.

At common law the lien of a *fi. fa.* continued only till the return day, unless that lien had been consummated by a levy before the return day. Unless levied upon before the return day

passed, the defendant's goods and chattels were discharged from the lien, and became subject to younger executions. Has that rule been changed by anything in our statutes? I think not. I can find no statutory provision affecting the common law rule, so far as *goods and chattels* are concerned. As to property subject to levy, and capable of being levied on, I find nothing requiring me to hold that the lien, or in other words, the *right to levy*, extends beyond the return day.

The power to seize the goods is derived only from the writ. What power is there to seize goods by force of a writ, the efficacy of which has expired by efflux of time? The officer has no power to seize, except what he derives from the writ: that power is limited to a particular day: after that day his power is gone, and it is his duty and his only duty and power in the premises, *to return* the writ, not to levy it. The *lien and the right to levy* are, as to goods and chattels, one and the same thing.

But I am referred to section 3, chap. 188, of the Code as giving this continuing indefinite lien upon "all the personal estate of the debtor." Notwithstanding the general nature of the terms used, I cannot hold that, taking into consideration all the statutes bearing upon the question, and comparing the whole of that chapter with the preceding one, that it was intended to include goods and chattels capable of being levied on. To my mind there are many considerations leading to this conclusion, some of which I will mention.

In the first place upon the construction contended for, there would be no need at all for chap. 187. If chap. 188 gives a general, continuing, indefinite lien upon goods and chattels, as well as upon *choses in action* and estate incapable of levy, then chap. 187 is wholly useless, and the legislature has done the vain thing of enacting a whole chapter without any object. But upon the theory that one chapter was intended to operate on *goods and chattels* (which is its very language,) and the other upon *choses in action* and estate incapable of levy, the reason of the two statutes is apparent, and their harmony complete.

Again, we see that the two chapters operate against different classes of persons. One gives a lien against "creditors and purchasers for valuable consideration without notice:" the other against "assignees for valuable consideration, and persons making payments to the execution debtor." Now these are distinct classes of persons: and the terms used are appropriate to different sorts of property. "Creditor" or "purchaser" is to be affected in relation to a different description of property from that in which the rights of an "assignee" may be involved. I do not

think that these different characters can or ought to be confounded.

Then as to the manner in which the two chapters are to be carried into effect. A cumbrous and complicated machinery is provided by chap. 188, for carrying into effect the lien given in that chapter. It is only necessary in regard to the estate not capable of being levied on. But it is useless to effect the purposes of chap. 187. That chapter is complete in itself. The sheriff is competent to do every thing that is necessary under that chapter. None of the machinery provided in chap. 188 need be invoked in the case of an actual levy, or in relation to effects upon which such a levy may be made. By a careful examination of chap. 188, I think it will be seen that the provisions for enforcing a lien are applicable only to *choses in action*.

This view is strengthened by a reference, in particular to sec. 17, of chapter 188, to which my attention was specially called by the plaintiff's counsel. That section provides that although a creditor may have availed himself of the provisions of chap. 188, he may from time to time, sue out *other executions* without affecting his lien under it; that is under chap. 188. Now why should this be? If chap. 188 gives a lien on *goods and chattels*, of a general and *continuing* character, that lien is expressly reserved by this section, and yet new executions are authorised. Other executions against what? Against goods and chattels alone: for as against other estate there is an existing and effective lien and no new writ is necessary. It is conclusive to my mind that the legislature intended that the lien on goods and chattels should not continue beyond the return day—that such lien was not to stand upon the same footing with that on *choses in action* which is expressly reserved; and that to reach goods and chattels, after the return day, the creditor must sue out *other executions*.

But sec. 3 of chap. 188, contains in itself a provision conclusive of this case. It is found in the last clause of that section in the words: "This section shall not impair a lien acquired by an execution creditor under chapter one hundred and eighty seven." Let us apply this provision to the facts of this case. On the 18th January, the plaintiff delivered his *fi. fa.* to the officer, thereby acquiring a lien on all the goods and chattels of his debtor; and on the 23d that *fi. fa.* was levied on a mare, whereby the lien became specific and complete as to that particular chattel. His lien, it is true, was subordinate to that of another small execution in the defendant's hands, as to which no question is raised. He asserts his claim to the benefit of his levy; and he is met by the pretension that there is an older and superior lien on the property. That lien arises upon two executions

which had not been levied, and the return day of which had passed. It is alleged nevertheless that that lien still continues, and we have seen that such pretension can rest only on the 3d and 4th sections of chap. 188. It could not exist at common law; it does not arise under chap. 187. It is only the lien "in addition" "acquired under the" 3d "section" of chap. 188. But that section itself is not to "impair the lien acquired by" the plaintiff, under chap. 187. The plaintiff falls within the very category contemplated by this saving clause. He had acquired a lien under chap. 187, in express terms that lien is not to be impaired by chap. 188. As to *him*, if there be *any* continuing lien on goods, it is powerless.

It is not for courts to say that the legislature has no power to pass an impolitic law. But where there is a question of intention and construction, and one view of a statute will be productive of great inconvenience and danger to the community, while the other is free from such objections, it is due to the legislature to put the safer construction on what they have done, if that safer construction be admissible. It is indeed a legitimate and persuasive argument against a particular construction of a statute, to say that the legislature could not have intended to enact a law from which dangerous consequences will result. Now the results of that construction of this statute which would deduce from it a continuing, indefinite lien on goods and chattels, would be so disastrous to the community, and so contrary to public policy that I cannot believe the legislature intended to produce those consequences. This construction would imperil the right to a very large portion—perhaps the largest part, of the personal property in the Commonwealth. No man could safely buy property at an officer's sale, or indeed at any other; for he would never know when the property was free from the lien of some old execution. If the lien continues one day, it continues so long as the right to sue out an execution remains, or the right to enforce the lien by suggestion; and that is ten or twenty years, according as the fact may be as to the return of the writ. In my opinion such a construction would destroy all confidence between man and man, and would paralyze all trade and commerce. It would open a wide door to fraud and litigation; indeed I will not stop to enumerate all the evils which will result from this construction of the statute.

There are several other views which I might mention if necessary; but I have indicated those which have brought me to the conclusion which I have adopted. That conclusion is that the lien of a *fl. fa.* does not continue, as upon goods and chattels, beyond the return day: and that if an execution be not levied before the return day, the goods and chattels of the debtor are

discharged from the lien of the writ, and become subject to younger executions. Consequently, in this case, I hold that the lien of *Hutsell and Marshall's* executions was lost: that the property became liable to the lien of the plaintiff's execution: that the defendant ought to have paid the proceeds of the sale to the plaintiff, and that therefore the plaintiff must have judgment for the amount of his debt.

Judgment for the plaintiff.

UTTERING FORGED NOTES. INDICTMENT.

Commonwealth vs. Abram Womack.

Circuit Court of Halifax County, Virginia, October term, 1857.

An indictment for uttering, &c., forged notes, must charge that the counterfeit notes were uttered, &c., as true.

Selling counterfeit notes as counterfeit, is not an utterance or attempt to employ as true, within the meaning of the statute.

The first count of the indictment charged that the defendant feloniously did utter and pass to a certain John Burk, three several false forged and counterfeit bank notes, &c.

The second count charged that the defendant feloniously did utter and attempt to employ as true three other false, forged and counterfeit notes, bank notes, &c.

Green for the Commonwealth.

Flournoy, Carrington and Barksdale for defendant.

On motion to quash the first count on the ground that the notes were not charged to have been uttered or passed as true. LEIGH, J. sustained the motion.

On the second count the evidence was, that the defendant had sold the counterfeit notes to one John Burk, representing them to the said Burk as counterfeit.

On motion, the court instructed the jury that selling counterfeit bank notes as counterfeit, is not an uttering or attempting to employ as true, within the meaning of the statute.

TOD v. BAYLOR, REVIEWED.

Tod vs. Baylor, 4th Leigh 498.

A writer in the July number of the Law Journal, has reviewed our review of *Tod vs. Baylor*, published in the preceding April number, and we propose, very briefly, to correct some mistakes and omissions made by him in "correcting the alleged mistakes on our part."

Before proceeding to consider the question at issue, we will remark that the case of *Braxton vs. Coleman*, 5 Call 434, was before us when our first article was written, but that we did not count on it because, the question here did not arise in that case, and because whatever might have been decided in it, it was unquestionably overruled if inconsistent with *Tod vs. Baylor* as construed by us. So in regard to the case of *Wilson vs. Davisson*, 2 Rob. Rep. 384—it may be remarked that this question was not even *squinted* at either in the arguments of counsel or in the opinion of the judges. The case turned entirely on the questions whether the wife was entitled to dower at all or not, and if so what was the present equivalent in money of her dower interest, according to the longevity tables, and "the errors in the details of the decree for which it was reversed "had reference to this last question." So also in regard to the case of *Blair vs. Thompson*, 11 Grat. 441. We still say that this question did not arise in that case, that if it might have arisen, it was passed over *sub silentio*, and the report of the case (for the reason that the question did not arise) does not enable us even to see clearly and conclusively what was the effect of the judgment of the court on this question.

We submit then that none of these cases can be invoked for the solution of this question, and that the enquiry as to what was decided by *Tod vs. Baylor*, depends solely on the reports of that case, and of those of *Thomas vs. Gamel et ux.*, 6 Leigh 6, and *Macauley vs. Dismal Swamp Land Company*, 2 Rob. 507.

Let us see then how the matter stands on these cases.

In the article to which we are replying, it is stated that Mr. Robinson, in his Practice, 2 vol. p. 10, cites judge Cabell as concurring with judge Brooke, in *Tod v. Baylor*, instead of with judge Carr, as the reporter states, and it is conjectured by the writer, that this statement is the result of an examination of the original record in the clerk's office of the Court of Appeals. This conjecture, made as it is, without any authority in Robinson for it, would seem to be sufficiently unreliable for this reason, but we are persuaded that it is entirely so, for we have examined the original records ourself, and can find no evidence whatso-

ever of the manner in which the judges were divided. We are also informed by the clerk that he has none of the opinions in the office, his impression being that at that day, they were not filed, but were simply handed to the reporter. We submit then upon this point, that there is as much reason for supposing Mr. Robinson to be mistaken, as that Mr. Leigh was so, and that whether this is so or not, the statement of the reporter of any fact about a case, is, in the absence of overruling evidence, to be relied on in preference to that of any other person, and especially so in the absence of evidence that that person has made that thorough examination of the case, which the duty of the reporter requires him to make.

We may remark, in passing from this matter, that Mr. Robinson here cites, in confirmation of the views of Judges *Tucker and Carr*, and in support of their opinion on this point, a case then recently decided in New York, the case of *Johnson vs. Thomas*, 2 Paige 377.

Judge Brooke's opinion in *Macaulay vs. The Dismal Swamp Land Company*, is also cited to show this mistake. But that judge Brooke is himself mistaken, is shown from the very quotation made from him—for he states that "*the court thought the widow entitled to profits from the issuing of the subpoena, with the exception of the president, who thoughts he was only entitled from the date of the decree.*" Now we have already shown that judge Cabell concurred with Carr, but whether this be so or not, judge Carr certainly, and confessedly, concurred with judge Tucker. Judge Brooke is wholly mistaken then on this matter, and we submit that in this view of the case, the reporter's statement of it must be taken to be correct.

How then does the matter stand? We have in *Tod vs. Baylor*, three judges—*Tucker, Carr and Cabell*, concurring in the opinion that damages are not to be allowed the widow for detention of dower, against the alienee of the husband, and at the most, we have on the other side judge Brooke, who merely gives a contrary judgment, without giving any reasons for it.

But again, even if there were doubt about this view of *Tod vs. Baylor*, the case of *Thomas vs. Gamel* is not only plump, explicit and emphatic on the point, but is confirmatory—nay decisive, (being decided by the same judges) that the decision in *Tod vs. Baylor* was as we have stated it. There is an amusing coolness, in the summary way in which the writer in the July number disposes of *Thomas vs. Gamel*. He says: "It seems to be sufficient to say of that case, that it was an action at law, while all the other cases cited were suits in equity." And this is his only commentary on it. Now we submit it is wholly insufficient to say so, in view of the fact that in *Tod vs. Baylor*,

the court, if it decides nothing else, does decide in the most distinct and emphatic manner, that it makes not the least difference in the world, whether the case is one at law or in equity, for that the rule is the same in both courts. We have already quoted their language on this point in our first note, and need not repeat it.

Finally, that the construction we have put on these two cases, is the correct one, is settled and established by the case of *Ma-cauly vs. Dismal Swamp Land Company*. In that case three judges only sat, *Baldwin, Allen and Brooke*. In the decree all the judges concurred, though judge Brooke delivered an opinion, on which we have already commented above. Judge *Baldwin* delivered the opinion of the court (concurred in by judge *Allen*) in which he says, that the defendant had invoked the authority of *Thomas vs. Gamel et ux.* 6 Leigh 6, and *Tod vs. Baylor*, 4 Leigh 498, against a claim to mesne profits by the widow, and adds: "In the former it was held that *mesne profits cannot be recovered at law by the widow, against the alienee of her husband*, because the statute of Merton, adopted into our code gives damages only when the husband died seized; and *in the latter, that they cannot be recovered in equity, which conforms to the law in this respect.*"

Language cannot be made plainer than is this.*

P., Jr.

* This article would have appeared in the January number, but procrastination, and other engagements caused its delay.

PRINCIPAL AND AGENT. PLEADING. RIGHT OF ACTION.

Watson vs. Bonds.

Circuit Court of Carroll County, Va. March Term, 1858.

An agent may maintain an action upon a contract made in his own name, when the name of his principal was not disclosed, and the defendant did not know that the plaintiff was acting for another person.

This was an action on the case for an alleged fraud in an exchange of horses. One count charged that the defendants *warranted* their horse to be a good, quiet, gentle, trusty work horse," and alleged, as a breach, that the horse would not work at all, but was vicious, ill-tempered and dangerous. The other count charged that the horse would not work, but was vicious and dan-

gerous, yet the defendants falsely and fraudulently represented him to be a good, gentle, safe work horse, knowing the contrary. Pleas, *non assumpsit and not guilty*.

Cook, Wysor and Tipton for the plaintiff.
Poage and Walker for the defendants.

The evidence tended to establish this case. In the summer of 1857, the defendants *Ben. and Samuel Bond*, had a horse which *Dr. D. B. Sanders* of Wythe, wanted to purchase. He and defendant, *Samuel Bond*, made several efforts to trade, but failed. *Sanders* informed *Bond* that he wanted the animal for a family horse: that he had a match for him, and intended to put him in his carriage. *Bond* always assured *Sanders* that the horse was perfectly safe and gentle, "a number one work horse, under any circumstances." *Watson*, the plaintiff, heard these assurances, and on two or three occasions, *Bond* told *Watson* that the horse was "as good a work horse as any man's horse." In August 1857, *Sanders* came to Hillsville to buy the horse, but *Bond* was not there, and *Sanders* had not time to go to his house. He handed *Watson* \$125, and requested him to go to *Bond's* house and buy the horse for him, *Sanders*. *Watson* went to *Bond's*, and offered him \$125 for the horse. *Bond* declined to sell—saying that he could not do without a work horse; but offered to swap the horse for a mare of *Watson's*. After some chaffering this was done: *Bond* again recommending the horse as a good worker. *Watson* did not tell *Bond* that he was acting for *Sanders*, and *Bond* supposed that he was trading with *Watson* on his own account. *Watson* sent the horse to *Dr. Sanders* the same evening; and on the next morning the latter had him harnessed to his carriage. The horse not only refused to work, but attempted to spring down a rough bank, endangering the family of *Dr. Sanders*, whom he had placed in the carriage without suspicion. The horse also attacked one of the doctor's negroes, and ran him out of the stable. *Sanders* had him thoroughly tried, and finding him wholly unmanageable, and also very dangerous in his temper, took him back to *Watson*. *Watson* refunded the money, and took the horse back; and called on the defendant's to take him back, and return the mare. This they refused to do, and this action was the result of their refusal. The defendants also introduced testimony tending to shew that the horse had been gentle, safe and steady so long as they owned him.

The defendants moved the court to give the jury this instruction: "If the plaintiff, in purchasing the horse, acted as the agent of *Dr. Sanders* and for his benefit, then he cannot main-

tain this action ; but the right of action is in *Sanders* alone."

The plaintiff objected to this instruction on the ground that it was a mere abstract question of law : there being no evidence to justify it. And they also contended that an agent may maintain an action on a contract in his own name, when his character of agent was not disclosed in the transaction, and the other party treated with him as a principal.

In support of their instruction, the defendants cited 2d Tucker's Commentaries 210, (side paging.)

The following authorities on the other side: *Saunders* on Plea. and Evid., 2d vol. 684: *Sims vs. Bond*, 27 Eng. Com. Law Rep. 97. 1st *Parsons on Contracts* 55, note d. 2d Smith's Lead. Cas. 198, (side paging.)

FULTON, J.

The court ought not to give an instruction merely because such instruction may embody a correct exposition of the law. In addition to this it must appear that the principle announced is applicable to the case in hand. Now here I do not think it necessary to decide the question whether an agent can maintain an action on a contract made by him, *as agent*; because there is no evidence at all that in this case the plaintiff did contract *as agent*. It is true that, as between himself and Dr. *Sanders*, he is shewn to have been acting as the agent of *Sanders*; but there is no evidence of this as between him and the defendants. So far as appears from the evidence, they did not know or believe, nor had they any reason for believing that the plaintiff was acting for any other person. They dealt with him as a principal. I must therefore refuse the instruction asked for by the defendants, on the ground that it is not applicable to the case at bar.

Being asked for an instruction, I must give such as I think correct. The authorities clearly establish this proposition—that where an agent deals in his own name, without disclosing his principal, the agent may maintain an action for breach of the contract. And the converse of the rule also seems to hold; to wit—that upon a contract so made, the agent may be held personally liable. It is true that in such cases the principal may also sue or be sued; but that does not destroy the agent's right of action. I shall, therefore, say to the jury that the plaintiff has a right of action in this case, although he made the contract at the instance and for the benefit of Dr. *Sanders*, unless the fact that he was acting for *Sanders* was disclosed to the defendants when the contract was made.

There was a verdict for the defendants; but the court set it aside and granted a new trial.

OFFICER'S BOND. WRIT. FAILURE TO RETURN.

Crandall vs. Sharp and another.

Circuit Court of Carroll County, Va. March Term, 1858.

The *defendant* in an execution may maintain a motion against an officer for failing to return the writ.

The official bond of a sheriff is not a *contract* in the sense in which that word is used in the Code of Virginia.

Notice of a motion for a fine for neglect of duty, is given to a sheriff and *one* of his sureties: this is irregular, and no judgment can be given against the surety, though under this notice a fine may be imposed on the sheriff.

Thomas Crandall at this court, moved for a fine, under the second clause of the 29th section of chap. 49 of the Code, page 251, against the late sheriff of Carroll county, and *one* of his sureties. On examination of the notice it was found to be directed to "*Thomas M. Sharp*, late sheriff of Carroll county, and *F. L. Hale*, *one* of the sureties of said *Sharp* in his bond as sheriff." The notice recited that an execution had issued from the clerk's office of the Circuit Court, in favor of *King* and others, against *Crandall* (the plaintiff in the motion,) which had been paid off by him, to *Coleman*, a deputy of defendant *Sharp*: that *Coleman* had failed to return the execution, and that for this failure the court would be asked to fine the defendant *Sharp* and his surety *Hale*, in a sum not exceeding five *per centum per month* of the amount of the execution.

The defendants appeared, and moved the court to quash the notice and overrule the plaintiff's motion on two grounds:

First, that the *defendant* in an execution cannot sustain a motion against an officer for failing to return that execution.

Second, that if such motion can be supported at all, it cannot be sustained against *one* or any *part* of the sureties—but if any one is included in the notice, it must be directed to all. It was not questioned that the notice would be good if directed to the sheriff *alone*: the contention was that if *any* surety were proceeded against, *all* must be included.

Hardy and Poage for the plaintiff.

McCamant and Wysor for the defendants.

The plaintiff relied, as to the first point, on the section before mentioned, which gives the motion to "any party injured" by the failure to return the process; and contended that a defendant in an execution may be seriously injured by the failure to return. The claim against him is of record, and so ought to be his discharge. On the second point they referred to section 6,

chap. 167, page 640, as giving the motion "severally against each, or jointly against all, or jointly against any intermediate number" of those liable.

For the defendants it was contended that the person against whom a *fi. fa.* issued, is not "a party injured" in contemplation of the statute, by a failure to return. That statute is not intended for his benefit. It looks only to the advantage of the plaintiff. The defendant cannot be injured by such failure. On the second point they contended that the provision, giving a remedy by motion, on sixty days' notice, in place of an action, is confined to cases of *contract*, and is not applicable to the official bond of a sheriff. Such bond is no contract, and has none of the elements of a contract. They discussed the doctrines of the common law in regard to joint actions and actions on joint and several causes of action and referred to the case of *Ward vs. Motter*, 2d Rob. Rep. 536, to shew that those doctrines are in force with us, when not affected by statutory provisions; and contended that there was no statute affecting a sheriff's bond in this particular.

FULTON, J.

I entertain no doubt on the first question. I think the defendant in an execution may well maintain a motion to fine the sheriff for failing to return that execution. He may be, and often is, a "party injured" by such failure. The records of the court shew a judgment against him; how is he to shew that such judgment has been discharged, but by shewing from the same records that an execution issued and has been satisfied? It is said that he may take a receipt: so he may—but that receipt may be lost, stolen or destroyed. Besides he is entitled to *second* evidence of his discharge. The satisfaction of the demand ought to appear by testimony, similar to that which establishes that demand. Moreover, a man's credit may be injured, if not destroyed by the fact that the records of the court shew executions in force against him, and at the same time furnish no proof that they have been paid. No one but the sheriff may know that fact; and the defendant's credit may thereby be ruinously affected. I shall overrule this objection to the notice.

The second question is more difficult. I may at once say that I agree with the defendant's counsel in their construction of the chap. 167, of the Code. The remedy by motion, given by that chapter, as a substitute for an action, applies only to cases of contract. I do not regard a sheriff's official bond as a contract. A contract is "an agreement of two or more competent persons, upon sufficient consideration, to do or not to do

a particular thing." In regard to these bonds there is no agreement made; no consideration, and no undertaking to perform or omit any particular act. It is a mere general undertaking that the sheriff shall perform his official duty—a duty involving countless particular acts. It is in form a contract made with the Commonwealth; in substance it lacks all the ingredients of a contract. On this head we may borrow light from the 3rd section of this same chapter. It provides that judgment may be obtained on ten days notice in all cases wherein particular time is fixed. Now no particular time is fixed, for the notice of motion against a sheriff and his sureties: whilst the motion under the 5th section of this chapter requires *sixty* days' notice; and embraces a peculiar provision as to returning and docketing that notice. Now the proceeding against a *part* of the persons liable to payment, allowed by the 6th section, is, I think, clearly confined to the cases contemplated by the 5th section; for the two are connected; and under them, therefore, I find no authority for proceeding only against one or a part of the sheriff's sureties.

Our remedies by motion, are cumulative to those which the common law afforded. In enforcing them we are to be governed by common law doctrines when not affected by statutory provisions. Our common law rule is, that in enforcing a joint obligation, you must proceed against *all* the obligors who are *in esse* when you commence your action. In an action on a joint *and several* cause of action, you may go against any one, or against all: not against any intermediate number. Now suppose this was an action on this joint bond, instead of a motion; must not *all* the joint obligors have been included in your writ? I think so; and I know of nothing which authorizes a change so far as the sureties are concerned, merely because the proceeding is in the shape of a motion. A demurrer to a declaration on this ground would be sustained; and I must therefore direct this motion to be dismissed as to Mr. *Hale*. He is entitled to claim that his co-sureties be joined with him, and bear their proportion of any burthen incumbent upon them.

But the foregoing remarks do not apply to the sheriff himself. His liability differs from that of his sureties. *They* are bound solely by force of the bond. *His* liability arises from the duty of his office: if he had given no bond he is liable to be fined. At the common law he was liable to an action for any neglect of duty; and that liability remains, though the legislature has superadded the safeguard of a bond with security. That bond does not affect either his common law liability, or his liability to a fine upon motion under the statute. As against him we need not regard the bond at all. We look only to the

facts that he is sheriff, and has not done his duty. Nor do I think that the fact that another person, against whom no judgment can be rendered, is joined in the notice, affects the regularity of the proceeding against the sheriff. As to him the insertion of Mr. *Hale's* name is mere surplusage. The notice to him is sufficient. I shall render a judgment against the sheriff for a fine of one *per centum per month* upon the amount of the execution.

PROCESS. RETURN. PLEA IN ABATEMENT.

Wadsworth et als. v. Coleman et als. Roberts et als. v. The same.

In the Circuit Court of Carroll Co., Va., March Term, 1858.

A writ is directed "to the coroner of C. County:" the court on a motion to quash the process will not enquire into the fact whether there is any coroner of said county. If there be none, it is a matter which must be pleaded in abatement.

The court will not, on motion, set aside an office judgment and order for enquiry of damages, for any defect in the writ or the return thereof; such defect can be taken advantage of only by plea in abatement.

A summons to answer an action may be served by any person, who may make affidavit to the fact of service. It does not require an officer to serve it.

Two actions of debt in the name of the Commonwealth—one at the relation of *Wadsworth, Turner & Co.*,—the other at the relation of *Roberts, Early and Worrell* against *R. S. Coleman*, sheriff of Carroll, and the sureties in his official bond. The declarations were very much alike, each charging that the relators had sued out a *fi. fa.*, and placed it in *Coleman's* hands to be levied; and that by his negligence and misconduct the debt had been lost. The original writs of summons, by which the actions were commenced, were directed "to the coroner of Carroll county." On one of them was this endorsement, "executed by delivering a true copy of this summons to each defendant within named, before the return day. *Robert Kenny, C. C. C.:*" and to this return was annexed an affidavit of said *Kenny*, verifying the return. On the other was endorsed an affidavit of *Peter Early*, stating that he had delivered a copy to each defendant before the return day—which return day was the January Rules, 1858. Being returned with the endorsements aforesaid, and no appearance being entered, the clerk

took the usual steps—office judgments were regularly entered, orders for enquiry of damages made, and at this term the causes were placed in their due turn on the docket of new writs of enquiry.

Cook for the plaintiffs.

Wyson & Poage for the defendants.

The defendants entered an appearance at this term, and moved the court to set aside the office judgment and orders of enquiry, to quash the original process and returns, and dismiss the actions—for the following reasons.

First. That there is not, and at the commencement of the actions there was not, any coroner of Carroll county.

Second. That the writ was not directed to any proper officer, there being no coroner in said county.

Third. That the writ could only be properly directed to the coroner—as the sheriff was a defendant in the action—or in case of a vacancy in the office of coroner, could be only directed to a constable; and as the office of coroner was vacant, these writs should have been directed to a constable.

Fourth. That the statute is imperative in this instance—the word “shall” being used; and that, therefore, the service by any other than a constable was void, as there was no coroner, and the writ could only be directed to a constable.

In support of these views the counsel for the defendants relied on the 21st 22nd and 23rd sections of chap. 49, page 249 of the Code.

Cook for the plaintiffs, contended

First. That original process, if it appear to be duly served and good in other respects, is good though not directed to *any* officer, or if directed to one officer, it be executed by any other to whom it might have lawfully been directed.—Code, chap. 170, sec. 2nd, page 642. Here the writs *are directed* to an officer—to wit, the coroner, by whom they might have been lawfully executed. If there *is* a coroner, it is proper to direct the process to him, the sheriff being a defendant.

Second. That the process being directed, on its face, to the proper officer, may be *served* by *any* person. Section 6 of the same chapter, page 643, directs that the summons may be served as a notice is served under the first section of Chap. 167. Turning to that chapter and section on page 639, we find that the notice may be served and returned by any person, other than a sheriff or sergeant, who shall verify the return by affidavit. The sheriff is *obliged* to serve the notice when thereto required: but service by any one else is good when properly proved.

Third. That the court cannot enquire into the fact whether there is a vacancy in the office of coroner. If such matter could affect the process, it can only be enquired into by a jury, empannelled to try an issue joined upon a plea in *abatement*. Sec. 18, chap. 171, page 648, enacts that no defect in the writ or return, when "the process appears to have been served," shall avail the defendant unless pleaded in abatement. Now then the process has certainly been *served*, and as we have tried to shew, *properly* served; and any question as to it could only be raised by plea in abatement.

Fourth. That it is too late, in this stage of the cause, to plead in abatement. The conditional judgment has not only been entered, but confirmed, and a writ of enquiry awarded; and sec. 19 of the chapter last quoted, forbids *any* plea in abatement after a conditional judgment. To set aside an office judgment the defendant must plead to issue." Sec. 45 same chap.

The counsel stated as a matter of fact, in justification of the clerk, that Mr. *Kenny* was now coroner of the county, and acting as such.

FULTON, J.

The matter of fact upon which this motion is founded, is one which I cannot enquire into on such a motion. How am I to try the question whether there is a coroner of Carroll county, *on motion* to quash the proceedings in the cause? On the one hand I am told that Mr. *Robert Kenny* is coroner; and I have before me what purports to be his official act in that capacity. On the other hand I am told that there is no coroner in this county. Now the defendant has had full opportunity to raise that question in proper shape—by plea in abatement. The fact could then have been easily shewn, one way or the other; and we could have settled its effect upon the cause. But I shall not look into the question on his motion, at this late stage, when he did not see proper to put it in issue by the appropriate plea. I can only look at the process as it is written. I find it directed to the coroner. I cannot presume that the clerk would so direct it when there was no such officer. *Omnia præsumuntur rite actu.* I find too that one writ is returned by a gentlemen who calls himself coroner of Carroll county, and is so called by the justice who certifies his affidavits. I cannot presume that he would usurp the office. So far then as the direction of the writ is concerned, I must presume and do presume that it is correct, and that it is properly directed to the coroner.

But the statute does not require the process to be directed to any officer, if it be duly served and good in other respects. No

exception is alledged to these writs, except in regard to the direction. "In other respects" they are good. If properly served, or rather if they *appear* to be properly served, there is an end to the question; for by the very words of one of the sections quoted by the plaintiff's counsel, no defect in the writ or return can be enquired into, except by plea in abatement. There is a difference, not unimportant in the phraseology of two of these sections. The 2nd section of chap. 170 uses the words "*duly served*:" in the 18th sec. of chap. 171, the word "*duly*" is dropped, and it is sufficient if the writ "*appear to have been served*." If, then, the process appear to have been served, or at any rate has been *duly served*, this motion must fall. Do these writs appear to have been so served? I think they do *appear* to have been *duly served*. It is true that the sections of chap. 49, cited by the defendant's counsel, provide that in a case where it is unfit for a sheriff to execute process, (as in this instance) it *shall* be executed by a coroner or constable as the case may be. But I think this language is only directory, not mandatory; and that the provision is overruled by the 6th sec. of chap. 170, which enacts that "*any summons*" may be served as a notice is directed under a preceding chapter. It is clear that the *notice* may be served by any person who will verify the service by affidavit; and I hold that the same provision applies to a summons to commence any action.

Thinking then that the process is properly directed, and has been duly served, I must overrule the motion, and direct the order for an enquiry of damages to be executed, unless the defendants will "*plead to issue*."

The defendants then pleaded "*conditions performed*," and juries being waived, the whole matter was tried by the court, and the plaintiffs had judgment for their demands.

MARRIED WOMAN. SEPARATE ESTATE. STATUTE OF LIMITATION.

Vaughan v. Walker. 6 Ir. Ch. Rép., 471.

It was held in this case by Lord Chancellor of Ireland, that the liability of a married woman having separate estate for a debt, which would be a simple contract debt in the case of a person *sui juris*, is not barred by the lapse of six years from the accruing of the cause of action, inasmuch as it is a charge enforceable in equity upon the separate property.

“Upon this subject,” said his Lordship, “there is little if any authority, except one case of very early date, which however turned, as nearly as I can collect from the report, upon the very point in question; and which, so far as I can discover, remains unreversed and unqualified by any subsequent decisions or expressions of opinion. I think, therefore, that if there be not something in it opposed to the law which has been latterly adopted, it must be taken as a decision binding upon the Court, unless reversed by some higher tribunal. That case is *Norton v. Turville* (2 P. Wms., 144), where a married lady having separate estate borrowed money and gave a bond. The bond, *qua* bond, was absolutely void in point of law, and gave no effect to the debt beyond any other engagement: therefore it was substantially a simple contract debt; and it was held that, although six years had passed, the demand was not barred. The phraseology of the judgment of the Master of the Rolls, as reported, is not very clear, and it may be supposed to point to facts which are not mentioned; but he says:—

“In this case, all the trust estate of the *feme covert* was a trust estate for the payment of debts; and a trust is not within the statute of limitations.’ I admit that expression to be so far a qualification of the general proposition, that it may be read as having been applied to the facts of that particular case alone, and as looking on the execution of the bond as the execution of an authority to change the separate estate, and deciding that the separate estate thus became effected with a trust for the payment of debts contracted under that authority; so that the creditor would have a right to have his demand paid out of the separate estate, notwithstanding any lapse of time. The expressions certainly may refer to facts not given in the report, but also they may well enough refer simply to the facts as stated; and I may therefore take it that, as the law then stood, the bar of the statute did not apply to simple contract debts which were payable out of such estate.

“Since that decision, however, views respecting the wife’s separate estate, which were not then so well established, have become fully settled. It is now held that the charge of debts on the separate state of a married woman is not to be considered as if it were accomplished by the exercise of a power; but that it flows from the nature of the estate, and is part of the capability which the Court confers upon a married woman in respect of her separate estate, as to which she is to be considered in most respects as *de facto* a *feme sole*, so as to have the power of retaining an attorney for purposes relating to it, and of his thereby acquiring rights to be enforced against it:” and after referring to the cases of *Murray v. Barlee* (3 My. & K., 209), *Hulme v.*

Tenant (1 Bro. CC., 16), *Owens v. Dickenson* (Cr. & Ph., 48), and *Vaughan v. Vanderstegen* (2 Drew. 163), his Lordship added:—"Those which are the more modern views do not appear to me at all to vary the nature of the case with respect to the Statute of Limitations; and as there is that decision in *Peere Williams* on this point, which has not ever since been reversed or qualified, and as no exception has been taken to it by any subsequent judge, I must at present abide by the old doctrine, and decree that the demand may be enforced as an equitable incumbrance on the separate estate, notwithstanding the lapse of time, and although if this had been an ordinary contract it must have been barred."

MARRIED WOMEN, &c.

Page v. Soper. 11 Hare, 321.

Married Woman—Consols settled to her Separate Use for Life, with power to Dispose of by Will—absolutely Entitled to—Bulwer v. Jay, 3 My. and K., 197—Disapproved of.

A sum of consols was settled to the separate use of a married woman for her life, and, after her decease, upon trust for such person as she should by will appoint, and in default of appointment, for her executors and administrators. Upon the death of her husband she applied for a transfer of the funds to herself and her assignees, offering to release her power of appointment. It was held by Sir W. Page Wood, V. C., who made the order asked for, that she was absolutely entitled to the trust funds. "My only reason," said his Honor, "for deferring my judgment was, that I had a recollection of a case in which a gift to the executors and administrators of a person has been held to be equivalent to a gift to the next of kin of that person. The case I allude to is that of *Bulwer v. Jay* (4 Sim., 48, 3 My. and K., 197). That case has, to say the least, been disapproved of by Lord Cottenham, who, in *Daniel v. Dudley* (1 Ph., 1, 7), says that the case of *Bulwer v. Jay* stands alone. I think, upon the whole, the case of *Devall v. Dickens* (9 Jur., 550), being before the same judge (Sir J. Wigram, V. C.), as *Holloway v. Clarkson* (2 Hare, 521), whose attention was called to the point, and the authority never having been the subject of appeal, I may follow it, and make the order asked by this claim."

EDITORIAL MISCELLANY.

The Editor received about the beginning of the year, a subscription of five dollars from a gentleman for another and gave his receipt therefor, the memorandum containing the name has been lost. We would be glad if the person who paid, or for whom the money was paid, will send us the name in order that it may be credited.

It will be seen that the war of "the lien of the *fi. fa.*" is still waging in our columns and with increasing violence. We must commend it to our contributors on this agitating question, not to let their angry passions rise. The summer time is coming, and nothing so much conduces to the effect of an argument as coolness. Brevity, we also commend, as one of the cardinal virtues of a correspondent.

BOOK NOTICES.

AN ANALYTICAL DIGEST OF THE LAWS OF THE UNITED STATES, *from the adoption of the Constitution to the end of the Thirty-fourth Congress,—1789—1857.* By FREDERICK C. BRIGHTLY, Esq. of the Philadelphia Bar. Kay & Brothers, Philadelphia, publishers.

We are much indebted to Messrs. Kay & Brothers for the work we notice. Heretofore there never has been an accurate, reliable and accessible digest of the United States laws and the authorities which have construed them. Mr. Brightly has secured the thanks of the profession by satisfying this want.

We have had frequent occasion to examine the pages of the Digest since its reception and unite our fullest meed of commendation, with that of our associates of the Bar, who speak of it in terms of high praise as an indispensable addition to the library of the practitioner. We need not speak of the necessity which now exists for Digests in all the branches of the law. Reports follow each other with marvellous fecundity, and constitutions and laws are made and unmade daily. It would be beyond human capacity to begin to keep up with them except through the means of Digests. They are absolutely necessary, in order to enable us to pick from the confused mass the tools with which to work. Mr. Brightly has performed his duty laboriously and well. His Digest is not only analytical, but the subjects are arranged alphabetically and annotated quite

fully with decisions of the State and Federal Courts. From the favor with which the book has met at the hands of the bar, we infer a heavy sale by the enterprising publishers.

REPORTS OF CASES, *Argued and Determined in the Court of Common Pleas for the City and County of New York, with Notes, References, and an Index.* By E. DELAFIELD SMITH, Councillor at Law. Vol. 3. New York: Lewis & Blood, Law Booksellers and Publishers, No. 84 Nassau St.

In commending the volume of Reports before us, which we have examined with some care, it is proper to premise that the cases reported are selected from the general term decisions of the Court of Common Pleas of the great commercial and trading emporium of New York.

It may be of interest to our readers to know what this court is and what is its jurisdiction. With a few limitations the New York Common Pleas, as a court of civil jurisdiction, is placed upon a parallel with the Supreme Court of the State, and has a jurisdiction both original and appellate. Its decisions are by law authoritative, in the Marine Court and in the District Courts.

In the changes made by the Constitution of 1846 and the ensuing legislation, all the Courts of Common Pleas throughout the State of New York were abolished except the ancient tribunal of that name in the city of New York, which was continued as a commercial necessity.

So vast and multifarious are the business operations in a community like New York, and such are the variety and number of the questions continually arising before such a tribunal that the practitioner will find, by an examination of the Reports, frequently recurring cases of interest and value in pleading and practice. Especially are the Reports valuable to the commercial lawyer. Almost every conceivable variety of question upon contract has to be decided; and although the amounts contested are frequently not large, the decisions are prepared with a care and ability which seems to be entirely regardless of the sums involved. Inasmuch, therefore, as the decisions of this court are subjects of appeal only to the highest tribunal in the State, namely, the Court of Appeals, where they are seldom carried, because of want of jurisdiction, the profession are compelled to resort to the decisions of this and other courts like it, having original and appellate jurisdiction.

Our examination of the work has enabled us to say that the decisions reported have been carefully selected, are valuable and interesting besides being in many cases novel, and that the index to the work—a most important and material part—is far better arrayed for convenience than most we have seen.

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No. 3.

LIMITATIONS ON FAILURE OF ISSUE.

We believe it is very generally supposed, that in no case arising upon a deed made, or upon a will of a testator who has died, since the 1st of January, 1820, can a serious question occur about the validity of a limitation over, dependent on the failure of issue of the first taker. Because every such limitation must be plainly valid or plainly void, in consequence of the statutory provision which took effect on that day. This, however, seems to us a mistake. Indeed, we should not hesitate to speak more positively, were it not for the deference we entertain towards an author, whose general merit entitles him to the important influence he does unquestionably wield over professional opinion in this State.* The provision alluded to, 1 R. C., 1819, p. 369, ch. 99 § 26, since re-enacted, in almost the same words and to precisely the same effect, (V. C., 1849, p. 501, ch. 116, § 10,) and which we quote in its revised form, is as follows: "Every limitation in any deed or will, contingent upon the *dying* of any person, *without* heirs or heirs of the body, or issue, or issue of the body, or children or offspring, or descendant, or other relative, shall be construed to take effect *when* such person shall *die* not having such heir, or issue, or child, or offspring, or descendant or other relative, as the case may be, *living at* the time of his death, or *born to him within* ten months thereafter, *unless* the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it." So that clearly, we think, the statute does not apply where either the limitation over is *not* "upon the *dying* of any person *without*" issue, but "*for want*," or "in default," or "*on failure*" of issue.

* Judge Lomax, in commenting on the statute in question says: (2 Lom. Ex'ors, 2nd Ed., p. 138,) "the consequence of this act is, that the donee, to whom chattles have been given, with a limitation over, upon the *failure* of his issue, to another, will no longer take the absolute interest, but in the event of failure of issue *at his death*, the limitation over will take effect." And again he says, (3 Lom. Dig., 2nd Ed., p. 437,) "the English authorities, as to the construction of limitations depending upon a *failure* of issue, will therefore soon become entirely obsolete, in this State." The contrary of both these propositions appears to us, at the least arguable, and, we think, maintainable.

of such person; (limitations very common in the reported cases, as may be seen in 2 Jarm. Wills 367—372, 379, 384—387; 3 Lom. Dig., 2nd Ed., 302—305, 417—419; and of which examples are furnished in *Brookes v. Taylor*, *Jee v. Audley*, and *Henry v. Felder*, cited hereafter.)—or it is upon a “dying without issue,” but the intention is plain to make it depend on a failure of issue, not at the death of the person indicated, or the end of a superadded period of gestation, but *afterwards*; (as in the *Anonymous* case from Dyer, to be considered hereafter.) And therefore, in every case of a limitation over, upon a contingency of this nature, in a deed made or will consummated by the testator’s death, since 1st January, 1820, there may be two questions, unless a negative answer to one of them shall preclude the other. First, whether the failure of issue contemplated is not tied up to the death of the progenitor or the termination of such ten months period, but may take place afterwards; a question influenced by the statutes, in some cases only, not in all—and secondly: whether (if so) the limitation over may not be nevertheless valid.

The latter of these questions is discussed, among others, in the subjoined paper, more fully than we have been able to find it elsewhere. For that reason partly, and partly because the cases are (as we are informed) numerous, which are yet arising under the old law, from the deaths happening about this time, of first takers under limitations governed by that law, we lay the whole of it, though somewhat lengthy, before our readers. It is the substance of an argument delivered by WM. GREEN, Esq., in a case lately pending before the Supreme Court of Appeals of Virginia.

Roberts’ Adm’r v. Petty’s Adm’r et als.

Roger Abbott, by will dated and recorded in 1809, gave to his daughter Susanna, then the wife of John Roberts, two female slaves named Nancy and Fanny, “to her and her heirs forever;” and, after giving other slaves, in like manner, to each of three other children named, directed that the residue of his personal estate (after deducting a provision made for his wife) should be divided among his six other children named and the four first mentioned, in such manner as to make them all equal, including the several bequests aforesaid, and that all his real estate should be sold and the proceeds divided in like manner: After which comes a clause of the will in these words,—“Ninthly, it is my will and desire, that, should either of my said ten children die without issue, then the part of my estate bequeathed to them shall be equally divided between them that are living.” In 1853, Susanna Roberts, who meanwhile had become Mrs. Fitzhugh, died, without ever having had issue; leaving two of her father’s children named in his will surviving her: And a question is raised, whether they became, upon that event, entitled to the share which was bequeathed to her of the testator’s estate.

There are three different senses of the phrase “die without

issue." The first imports an *indefinite* failure of issue; the second, a failure *at the death* of person referred to; the third, an extinction *subsequently* within a *limited* period. The first is called the *legal* signification, (I speak as at the time when the will in this case takes effect) because, in the absence of every circumstance and expression affording adequate indication of a different meaning, it will prevail; the second, acknowledged on all hands to be the *natural* signification, for which reason more recently statutes have been enacted in England (1 Steph. Comm. 562-3) as well as in Virginia and several of our sister states (4 Kent Comm. 279-80) to make it the legal signification, will ordinarily be adopted where the first is displaced; and the third, which may be called the *special*, will be admitted wherever it appears sufficiently, that the testator designed it. A bequest after a dying without issue, in the *first* sense, is *always void*; in the *second*, is *always valid*; and in the *third*, is *either* valid or void, accordingly as the allowed limits of executory bequest,—to wit, a life or lives in being at the death of the testator, (4 Ves. 227, *Theellusson v. Woodford*; 11 Ves. 112; 4 Bos. & Pul. 385, *S. C.*;) and either the minority of any child *in esse* when the longest of such lives terminates, 7 Durnf. & E. 100, (1st Americ. edit. 96,) *Long v. Blackall*; 3 Ves. 486, *S. C.*; Butl. Fearn 434, note 1;) or an absolute term of twenty-one years after the termination of such longest life, (10 Bingh. 140, *Caddell v. Palmer*; 3 Moore & Sc. 571; 1 Cl. & Fin. 572, *S. C.*; Sugd. Prop. 313-24;)—do, or no not, embrace the period within which, in order to raise the contingency provided for in the limitation over, the failure of issue must happen. This last proposition, which alone of all that have been advanced is debatable, not only seems to be sufficiently plain upon principle, and to result necessarily from the reason as well as the terms of the rule against perpetuities (1 Jarm. Pow. Dev. 388, note 1; 1 Jarm. Wills 219-223; Smith on Exec. Inter. 391; Keyes on Chatt. 136-137,) but is also sustained by authority.

A bequest to A. and the heirs of his body, and, if he die without issue, living B., then to B., (Salk. 225, *Lamb v. Archer*; Skinn. 340; 1 Eq. Abr. 193, *S. C.*; Butl. Fearn 470;) or to C., (Carth. 266, *Lamb v. Archer*; Comb. 208, *S. C.*; 2 Jarm. Wills 506;) is clearly a good executory bequest, in the one case to B., and in the other to C. So a bequest over, upon the death of A. without issue, to B. for life, (3 Atk. 449, *Trafford v. Boehm*; 1 Durnf. & E. 593, *Doe v. Lyde*; 7 Durnf. & E., 589, *Roe v. Jeffery*; 17 Ves. 482-483, *Barlow v. Salter*; 2 Rop. Leg. 4th edit. 1550-1551; 2 Prest. Abstr. 162; 2 Call, 316, *Higgenbotham v. Rucker*; 336, *Pleasants v. Pleasants*; 2 Munf. 491, *Royall v. Eppes*; 3 Lom. Dig. 1st edit. 295,

304;) or during widowhood, (2 Harr. & J. 356, *Drury v. Grace*;) provided such estates only, for life or during widowhood, and to persons *in esse*, be given over, (1 Barn. & Adol. 318, *Doe v. Owens*; 7 Ad. & Ell. 660, *Doe v. Ewart*; 34 Engl. C. L. Rep. 199, *S. C.*; 8 Sim. 22, *Simmons v. Simmons*;) is good. And so too is a bequest, which is similarly contingent, of an interest or estate, however ample, in property that from its nature cannot endure beyond a life or lives in being and twenty-one years afterwards,—such as slaves already born, and whose future increase are not included in the bequest, either from the character of its terms, (2 Munf. 479, *Royall v. Eppes*; Leigh 335 *Griffith v. Thomson*; 3 Lom. Dig. 1st edit. 305; see 4 Ired. Eq. Rep. 258, *Bowers v. Matthews*;) or from the sex of the slaves 6 Gill. & J. 232, *Bisco v. Bisco*; (4 Desaus. 318, *Dunbar v. Dunbar*; see 1 Murph. 42, *Matthews's adm'r v. Daniel*, and the Reporter's note to it;*)—or such as a lease for years determinable upon the dropping of lives which are in being, (2 P. Wms. 676-677, *King v. Cotton*; Butl. Fearn 489; 2 Prest. Abstr. 162-163;) or a lease for such lives, (3 Bro. P. C. 2nd edit. 50, *Wast-*

* In *Henry v. Felder*, 2 McCord's Chanc. Rep. 323-343, the question arose upon a bequest, in these words: "I give and bequeath to E. C. a negro girl named Dinah, to be to her and the heirs of her body lawfully begotten, forever, but on failure of issue, to go to the eldest child of my daughter, N. C." Chancellor Thompson held the limitation over to be void, and his decree was affirmed (no doubt rightly) upon the ground that though the property was of a perishable nature, as had been argued with reference to *Keily v. Fowler*, Wil. 298, Butl. Fearn, 482-484; yet it was also of a productive nature, and there might be an increase of it which would keep pace with the heirs of the body of the first taker. "But (said Colcock, J. delivering the judgment of the appellate court,) suppose the property given had been a *man*, yet he might have lived for a longer time than a life or lives in being and twenty one years;" (2 McCord's Chanc. Rep. 342,) from which it may be gathered to have been his opinion (if not that of the whole court,) that in such case also, the limitation over would have been void. Does not this seem very much like saying that a "man" may *outlive himself* more than twenty-one years?

If a will, in the very same words, only substituting "boy named Daniel" for "girl named Dinah," were this day made in Virginia, we think it would raise the question of the validity of the limitation over, with precisely the same effect as upon such a will of a testator who had died before 1st January, 1820; and that question would depend upon two points. 1st. Whether the decision in *Royal v. Eppes*, sustained in the manner it has been by the judicial and other opinions above referred to, should be followed against this *dictum* of Colcock, J.—and 2nd, whether "the failure of issue," being understood (as it seems to us that it must be) in the special sense above explained, would or would not invalidate the limitation upon it. This latter is the point principally discussed by Mr. Green.

neys v. Chappell; 3 P. Wms. 262, *Law v. Burron*; 1 Prest. Abstr. 437-438, *Mogg v. Mogg*; 2 Prest. Abstr. 162-163, *S. C.*; Prior on Issue 103;) even with a superadded term twenty-one years after the expiration of them, (2 Prest. Abstr. 162-163; Butl. Fearné 500 note *e*;) at any rate, if there exist not in the case any tenant-right of renewal. Rand. Perp. 157; Smith on Execut. Inter. 395-396. In these cases, and in others like them which will be mentioned hereafter, it has been doubted, (see 1 Jarm. Pow. Dev. 188, note 2; 1 Bail. Eq. Rep. 42, Rep's note to *Stevens v. Paterson*;) whether what is called the natural, or what I have called the special, sense of the phrase in question should be adopted. On this point opinions have been divided; it being thought,—on the one hand, that as the legal sense (of an indefinite failure of issue) was displaced, and thus an opening made for admitting the natural sense (of a failure at the death of the person referred to), the latter, because it is the natural sense, should be taken to have been the meaning of the testator, (Cro. Jac. 591, *Pells v. Brown*; Wilm. 306, 312, 321, *Keily v. Fowler*; 1 Durnf. & E. 597, *S. C.* cited; 7 Durnf. & E. 596, *Roe v. Jeffery*; 1 East 263, *Wood v. Baron*; 2 Harr. & J. 259, *Drury v. Grace*; 2 Munf. 491, *Royall v. Eppes*; 1 Johns. Rep. 449-450, 452, *Fosdick v. Cornell*; 10 Johns. Rep. 17, *Moffatt's ex'ors v. Strong*; 2 Murph. 83, *Den v. Pendleton*; 1 Ired. 567, *Fortescue v. Satterthwaite*; 17 Alab. Rep. 62, *Williams v. Graves*; 3 B. Monr. 487, *Hart v. Thompson's adm'r*; 8 B. Monr. 618-9, *Deboe v. Lowen*;)—on the other hand, that as the limit within which, according to terms of the bequest over, the failure of issue must happen, if at all so as to produce the contingency provided for in it,) contains room for a possible interval after the death of the person whose dying without issue is referred to, during which interval issue left by him at his death might afterwards become extinct, such subsequent and *interim* extinction should be taken to be within the compass of the contingency contemplated, (Prec. Chanc. 529, *Nicholls v. Skinner*; 3 Atk. 449, *Trafford v. Boehm*; Butl. Fearné 472-473; Prior on Issue 87; 5 Rand. 277-278, *Bells v. Gillespie*; 314, *Braudus v. Turner*; 1 Leigh 334, *Griffith v. Thomson*;)—and perhaps no positive decision has ever been made respecting it, in a case that revolved any question as to the validity of a limitation over, after death of a first taker.* But if the courts,

* There is a case of *Crowder v. Stone*, reported 3 Russ. 217, 7 Law Journ. Chanc. 93, and stated from Mss. Law Mag. 410, where a testator (according to the abbreviated but sufficiently accurate and full statement of the will in 2 Jarm. Wills, 431.) "bequeathed stock to his executors in trust for A. for life, and after her decease to B. for life, and after the decease of the survivor, the

without in any case determining that point, and, as seems to be

stock was to be sold and the produce divided between the testator's nephew and four nieces, and in case of the decease of any of them, without lawful issue, before their respective shares should become due and payable, then the part or share of him, her or them, so dying without issue as aforesaid, to go to the survivor,"—in the words of the will itself "go to and be equally divided between and amongst the survivor and survivors of them, share and share alike." The testator died in 1787, and A. (the first taker for life) died in 1823, having out-lived B., and the nephew and all but one of the nieces of the testator; whereupon several questions arose, as to the disposition then to be made of the stock or its produce. One of the nieces had died in July, 1797, leaving an infant son, who died without issue in 1799; and Lord Lyndhurst, C. decided that she "took nothing under the will," and therefore disallowed the claim preferred by her personal representative. Nothing was claimed for any representative of her son. Then it became necessary to determine what should become of the share that would have been hers if she had out-lived A. and B.; with reference to which it is to be noticed, that in August, 1797, between her death and that of her son, another of the nieces died, leaving children, who were still living; nevertheless Lord Lyndhurst decided that the personal representative of this last mentioned niece took no part of that share, and this upon grounds which would have excluded also her issue, if any claim on their behalf had been preferred; namely that "the shares which became subject to the operation of the bequest to the survivor and survivors" were "divisible among such only of the five legatees as were living (*that is surviving in their own persons,*) at the time when the events happened, on which the shares were to go over respectively," to wit: not at the death of any one of the five, if such one left issue that afterwards failed in the life times of A. and B., or before the death of the longest liver of them, but at the time of such subsequent failure. And on the same ground it was held that the representative of the niece was entitled to no part of the shares that, had she lived long enough, would have belonged to another niece, who died without issue in 1802, though the posterity of the former was then and still living. And lastly, Lord Lyndhurst decided that the niece last mentioned, though she died *sine prole* during the life of A., yet became entitled to part of the share that was to have been that of the niece who died first, had she lived long enough, and that this portion of the fund belonged to her personal representative, and did not go over to the nephew and niece, who survived her, though what would have been her own original share if she had survived A., did. The nephew died in 1805, leaving children, who were still living; and no question was made but that his personal representative was entitled to precisely the same proportion of the fund as the niece, who at the death of A. was the sole survivor of the original legatees. This case was mentioned to the Court by Mr. Green, but partly from his confidence in the other authorities cited, and partly from the manner in which the case is treated by the text-writers—Smith (on Execut. Inter.) and Keyes (Chatt. and On Realty,) who take no notice of it at all—Lomax (Dig. 1st. edit. 255, n.; 2nd edit. 368, n.; and Lewis on Perpet. 341, n.) who mention it each, only once, and especially Jarman (2 Jarm. Wills, 107-8; 431, 611-613, 617-618, 622, n., 735), he

the fact,—in many cases without even considering it, have held that the limitation over was (*quacunqve via*) valid, it follows necessarily, that in their judgment, in the several cases heretofore put, though there were issue of A. living at the time of his death, yet, if such issue should afterwards fail in the lifetime of B., or before the death of the slaves or the termination of the lease, the limitation over would take effect,—supposing it should then be determined that such event, and not a failure of issue of A. at the time of his death, was the contingency provided for. Such a decision indeed, would seem to be the unavoidable consequence of the well settled doctrine, that an executory bequest is good, if limited upon a dying without issue within the compass of twenty-one years after the death of *any* named person in being. Butl. Fearn 470.

Supposing this point established, there can be no rational doubt concerning a proposition advanced by Jarman, (2 Jarm. Wills 448-449,) that if the ulterior bequest, which is to take effect on a failure of issue [whenever it happens,], be to persons [answering any particular description] who shall be *living at the time*, such bequest is valid, provided 1. that it be confined to persons *in esse* at the death of the testator, and do not embrace an indefinite range of unborn beneficiaries, and 2. that the event, upon which such ulterior gift is to take effect, be the fact of the legatees' being alive, not merely at the death of the person whose failure of issue is referred to, but also when such issue, if he leaves any, shall afterwards fail. See 5 Rand. 312, *Broadbuss v. Turner*. It was for their non-compliance with the first of these requisites, that the limitations over in *Jee v. Audley*, 1 Cox's Chanc. Cas. 324, (see *ibid.* 326; 1 Jarm. Wills 256, note n; 2 Meriv. 391, *Leake v. Robinson*;) and in *Campbell v. Harding*, 2 Rus. & M. 390, (to be hereafter more fully noticed,) were void; and that the limitation over in *Deane v. Hansford*, 9 Leigh 253, (as explained by Judge Cabell, *ibid.* 259-260,) would have been proper to be condemned, though it had not also laboured under the same fault as the limitations over in the cases next to be mentioned, and though the decisions in those cases had never been disapproved. And it was

did not even present it as an authority to his purpose. Yet on careful consideration, it will be found to be very material in regard to several points of the argument. The circumstance which may distinguish it is, that the niece, who died first, it is said by the Lord Chancellor, "took nothing," yet in that case are those words to be understood, seeing that on *her* death, the niece who died in 1802 *did* "take," by reason of *surviving her* and did *keep*, at least a right, which vested in her personal representatives, to something, notwithstanding her own death occurred in the life time of A.

for the non-compliance of the limitations over in them with the second of these requisites, that the decisions in *Timberlake v. Graves*, 6 Munf. 174; *Gresham v. Gresham*, *ibid* 187; *James v. McWilliams*, *ibid* 301; and *Didlake v Hooper*, Gilm. 194, have been, in subsequent cases, (1 Leigh 335-336, *Griffith v. Thomson*; 9 Leigh 256-259, *Deane v. Hansford*.) disapproved,—and overruled, (3 Lom. Dig. 1st edit. 307-308; 2 Lom. Ex'rs, 1st edit. 70; if they have been overruled, which is perhaps doubtful. 9 Leigh 257-8, 259, 260, 261, *Deane v. Hansford*; 12 Gratt. 150-151, *Moore v. Brooke*.

No limitation over in the form mentioned by Jarman, or to the same effect, and complying with both the conditions he states, has ever been held to be bad,—I mean, since the limits of executory bequest have been comprehensive enough to embrace a life or lives in being other than that of the first taker; but such limitations have, in several instances, been held to be good. In one case, (1 Ired. 566, *Fortescue v. Satterthwait*;) a testator bequeathed slaves and other property, severally, to each, respectively, of his three children, J., S., and N., and then proceeded as follows,—“in case either of said children should die without heir properly begotten, it is my wish that the property should be equally divided between the children then living, whether J., S., or N.;" and in another case, (3 B. Monr. 486, *Hart v. Thompson's adm'r*;) he directed all his estate real and personal to be divided amongst his nine children named, and then proceeded in these words,—“and if either of my said nine children should die without heirs of their body lawfully begotten, that their part so allotted and given them as aforesaid be equally divided amongst my other children then living;" and it was, in each case, held that the limitation over was valid. So where a testator having only personal estate bequeathed it all to his wife, adding, “and after my wife's decease, the same I give to my daughter, the wife of Mr. Taylor, and then after my daughter's decease to the fruit of her body, but for want of such issue or fruit, to my brothers and sisters then living; and after them to their children, and the children of my brother Richard now deceased," and after the death of the wife and the daughter without issue living at the time of her death, a suit in chancery being brought against the husband of the latter, by all the testator's brothers and sisters, who were alive at the deaths of both the wife and the daughter, a case setting forth these facts was sent to the Court of King's Bench for its opinion upon the question “whether the subsequent limitations after the want of issue of the daughter's body, or any, and which of them are good, and to whom the said estate does belong," Lord Raymond, C. J., Page, J., Reynolds, J., afterwards Chief

Baron, certified their unanimous opinion that "the subsequent limitations" were "good and that the estate in question" belonged "to the plaintiffs" and Lord King, C. decided accordingly, 8 Viner. 313, *Brookes v. Taylor*, 2 Eq. Abr. 367; Mosely 188, S. C., cited from MSS., not quite accurately, Cas. Temp. Talb. 23, 24, 25, 26. And to the same effect (or, perhaps, in view of our Virginia decisions to be presently mentioned, I should say still more strong) are very numerous decisions in the courts of our sister states, and of the United States, upon limitations over, whether of personal property or even of real, to the survivors or survivor, or surviving members or member, of a class composed of individuals in existence (18 Johns. Rep. 382-383, *Jackson v. Billinger*;) at the death of the testator. 2 Mass. Rep. 56, *Richardson v. Noyes*; 1 Conn. Rep. 36, *Couch v. Gorham*; 1 Johns. Rep. 440, *Fosdick v. Cornell*; 10 Johns. Rep. 12, *Moffat's executor v. Strong*; 16 Johns. Rep. 382, *Anderson v. Jackson*; 20 Johns. Rep. 483, *Lion v. Burtis*; 2 Cowen 333, *Wilkes v. Lion*; 6 Cowen 178, *Jackson v. Thompson*; 4 Wend. 277, *Jackson v. Christman*; 23 Wend. 513, *Cullen v. Doughty*; 10 Paige 140, *Pond v. Bergh*; 3 Sandf. Chanc. Rep. 456, *Davissan v. De Freest*; 3 Barb. Chanc. Rep. 137, *Lovett v. Euclid*; 2 Halst. 363, *Den v. Wydendyk*; 3 Halst. 29, *Den v. Schenk*; 1 Spencer 6, *Den v. Allaise*; 223, *Seddell v. Wills*, 411, *Howell v. Howell*; 4 Dev. & B. 438, *Den v. Zollicoffer*; 1 Ired. 577, *Treadgill v. Ingram*; 3 Ired. 155, *Skinner v. Lamb*; 4 Ired. 255, *The State v. Norcombe*; 1 Ired. Eq. Rep. 25, *Gregory v. Beasley*; 1 Bail. Eq. Rep. 40, *De Treville v. Ellis*; 42, *Stevens v. Patterson*; 1 Hill's Eq. Rep. 154, *Cordes v. Ardrian*; 1 Richards Eq. Rep. 78, *Terry v. Brunson*; 5 Richards, 423, *Nix v. Ray*; Georg. Decis. pt. 2. pag. 29, *Mayer v. Wiltberger*; 17 Alab. Rep. 62, *Williams v. Craves*; 5 Yerger 369, *Lewis v. Claiborne*; 8 B. Monr. 618, *Deboe v. Lowen*; 12 Wheat. 153, *Jackson v. Chew*; 18 How. S. C. Rep. 202, *Abbot v. Essex Company*; 2 Curt. C. C. Rep. 126, *S. C.*

True, we have in Virginia some reported cases, in which apparently it has been held, that such limitation over of real estate, and in one instance (8 Grat. 346, *Nowlin v. Winfree*), of estate "both real and personal," to the survivors (2 Munf. 263, *Sydnor v. Sydnor*;) or survivor, (5 Rand. 308, *Broadus v. Turner*;) or surviving members, (5 Rand. 203, *Bells v. Gillespie*; 8 Grat. 346, *Nowlin v. Winfree*;) of a designated class, was invalid as an executory devise or bequest. Whether in all these cases it was really so held, is a point I need not agitate now, but about which I may perhaps beg to be heard in another case that is to come on hereafter. Assuming the decisions to

have been such, the divergence has proceeded from no difference of legal principle, but from a mere difference of verbal interpretation. In the courts of our sister states before mentioned, and of the United States, on the one hand, a survivor or surviving member of a class has been (in cases of this description) understood to be one who must be living, in his own person, at the happening of the failure of issue upon which the limitation over to him is predicated; so that, even if such failure occur at the death of the first taker, and therefore clearly within the allowed limits of executory bequest, yet the limitation over, though valid in its creation, fails for want of the contingency happening in which it was, by its own terms, to take place, unless he be then alive; and therefore, if he be then dead, neither his issue, if he leave any then living, (3 Johns. Rep. 292 *Jackson v. Blanshan*; 6 Cowen 178, *Jackson v. Thompson*; 1 Ired. Eq. Rep. 25, *Gregory v. Beasley*; 3 Ired. 155, *Skinner v. Lamb*; 4 Ired. 255, *The State v. Norcom*; 8 B. Monr. 620, *Deboe v. Lowen*; nor his personal representative, (1 Ired. 577, *Threadgill v. Ingram*;) can take, in his place, what, had he lived, would have come to him; nor, in reference to this point, has it mattered whether the limitation over was to the person so described, simply, (*Jackson v. Thompson*; *Skinner v. Lamb*; *The State v. Norcom*; *Deboe v. Lowen*;) or forever, *Gregory v. Beasley*; or to him and his heirs and assigns, *Jackson v. Blanshan*; *Treadgill v. Ingram*. In our courts, on the other hand, that expression has been (in the cases under consideration) understood to mean the same as the word "other," (5 Rand. 286, *Bells v. Gillespie*; 314, *Broaddus v. Turner*; see 1 Gratt. 305, arg. in *Dickinson v. Hoomes*; 3 Lom. Dig. 2nd edit. 409, note 1; or perhaps more exactly as describing one who survives either in his own person or in a living posterity; agreeably to what appeared to Jarman as its established signification in England, at the time of his publishing a supplemental volume to Powell on Devises. 2 Jarm. Pow. Dev. 723. Understood in either of those senses, such a limitation must violate one or the other of the two conditions before mentioned, and must therefore be bad.

In the interval which has elapsed since Jarman's publication just now mentioned, the courts in England have evinced a strong determination of adhering more rigidly to the literal meaning of the expression "survivor" or "surviving," (compare 2 Jarm. Wills 609 *et seq.*) and the consequence is, that, whereas it was then doubtful, whether they would sustain a limitation over, even of personalty, after a dying without issue, to survivors, (1 P. Wms. 534, *Hughes v. Sayer*; 2 Collyer 334, note a, *S. C.*; Prec. Chanc. 528, *Nichols v. Skinner*; 2 Meriv. 135, *S. C.*;

Butl. Fearn 481; 17 Ves. 479, *Barlow v. Salter*; 2 Meriv. 180, *Massey v. Hudson*; it is now pretty well settled that they will. 2 Myl. & K. 441, *Ranelagh v. Ranelagh*; 2 Collyer 331, *Turner v. Frampton*. See especially the judgment in the case last mentioned, and compare 2 Jarm. Pow. Dev. 589-90; 2 Jarm. Wills 447-48. And the late Chancellor Kent, who, in the case of *Anderson v. Jackson*, 16 Johns. Rep. 382, and in the earlier editions of his Commentaries, (lecture 60:) had signalized himself as a champion of the rule which our courts seem to have adopted, in a late edition of that work, (vol. 4, p. 277, note a, 6th edit.) after citing some of the cases that have now been mentioned, says: "These last decisions seem to be sufficient to change the former rule, and that a limitation to the survivor may be good by way of executory devise." But at present I have no occasion to insist upon that; though were the law perfectly settled in that manner, it would be absolutely decisive in my favour, and therefore I will barely mention that no decision has ever been made to the contrary by this court, where the limitation over comprised nothing but personalty, while in such a case, our reports furnish several authorities, more or less strong, in my favor. Jeffers. Rep. 5, *Waddy v. Sturman*; 2 Call 317, *Higginbotham v. Rucker*; 4 Munf. 504, 507, 508-9, *Garland v. Enos*; 6 Munf. 455, *Cordle's adm'r v. Cordle's ex'or*; 9 Leigh 257, *Deane v. Hansford*. All I need insist upon now is, that, the ground of the difference between the seeming (and, if you please, actual) course of decision in our courts and in the courts elsewhere, in such cases, being that which has just been explained,—the cases of *Sydnor v. Sydnor*, *Broadbuss v. Turner*, *Bells v. Gillespie*, and *Noulin v. Winfree* do not, upon the point for which they have been cited, create any obstacle in my way; while the host of authorities on the other side of that point, already cited, and which might easily have been enlarged, conclude *a fortiori* in my favor.

In our case the limitation over is, in effect, the same as if it were couched in these words: "Should my daughter Susanna die without issue, then the part of my estate bequeathed to her shall be divided, equally, between them that are living of my other children aforesaid." When living? Manifestly "then living," in the language of the wills in *Fortescue v. Saterthwaite* and *Hart v. Thompson's adm'r*, before cited, that is to say, "at the time" when the division is directed to be made, which is upon Susanna's being dead without issue. Language could scarcely be more explicit, and neither argument nor authority can render the point materially plainer. Yet the case of *Den v. Pendleton*, 2 Murph. 82, may be cited; where a testatrix having given lands to each of her two sons, and then added,

"if either of my sons dies leaving no heir lawfully begotten of his body, the living son shall be the lawful heir of all the land,"—though the first words, if they had stood alone, would have imported an indefinite failure of issue, the subject matter being real estate, (2 Jarm. Wills 418-419: 26 Engl. L. & E. Rep. 302, *Bamford v. Chadwick*; 14 Comm. Bench Rep. 708, *S. C.*;)—the limitation over was nevertheless held to be valid, as an executory devise, upon this reasoning: "The words, 'the living son shall be the lawful heir' mean the same as if she had devised the lands to Benjamin in fee, but in case he died without leaving heirs lawfully begotten of his body, living, or during the life of, Thadeus, then Thadeus to be the lawful heir."* The living son,—the son that is living,—“them that are living.” The parallel is complete.

If it be said, that this case of *Den v. Pendleton*, and the cases before cited of *Fortescue v. Satterthwaite*, *Hart v. Thompson's adm'r*, and *Brooks v. Taylor*, and the numerous cases upon limitations over to a survivor, or the like, (other than those in Virginia,) proceed upon a construction of the words "die without issue" in the natural sense, so as to tie up the failure of issue to death of the first taker; I answer that then they are authorities for construing the same words in the will of Roger Abbott in the same manner. If this be denied, and it be contended that those words in his will must be taken in the special sense, as importing an extinction of issue, subsequently to the death of the first taker, yet in the lifetime of some one or more of the other children of the testator; then, without abandoning my former position, I answer that, if this be so, still the position of Jarman (Jarm. Wills 448-449,) which has been mentioned; sustained as it is by the authorities which have been cited to support it, is applicable and conclusive. That the limitation over was intended to take effect upon a dying without issue in the legal sense, that is to say, upon an absolutely indefinite failure of issue, will not, I think, be pretended.

* In 1814, three years after the case of *Den v. Pendleton* was decided by the Supreme Court of North Carolina, that court held, in *Jones v. Speight's heirs*, Carol. Law Rep. 544,, that the meaning of the phrase, "die without leaving issue," is the same in regard to real estate that it has always been taken to be in regard to personal, and that it imports as to both a failure of issue at the death and this has ever since been the settled doctrine, in that state, (1 Dev. & Batt. Eq. Rep., 466, *Clapp v. Fogleman*, 4 Dev. and Batt. 440, 441, *Zollicoffer v. Zollicoffer*. But it certainly did not influence the decision in *Den v. Pendleton*; for the reasoning upon which that decision is founded, as the same is reported, manifestly proceeded upon a tacit concession that the former (and which is the later) doctrine of the courts of England, is as then, still in force among them.

In the court below, the question was asked from the bench, what would have become of Mrs. Fitzhugh's share if she had outlived all the other children of the testator, and then had died without issue living at the time of her death. To which it was answered, and properly, that in such case, as there would be no person in existence to take under the limitation over, though the event had happened, in which it was appointed to take effect, supposing it to be predicated upon her dying without leaving issue then living, (see 10 Sim. 116-117, *Leet v. Randall*; 21 Engl. L. & E. Rep. 261, *Widdicombe v. Muller*; 1 Drewr. 443, *S. C.*; 13 Gratt. 152, *Baylor's lessee v. Dejarrette*;) and as, supposing it to be predicated upon the extinction of her issue, then or afterwards in the lifetime of some one or more of the testator's other children named in his will, the happening of the event in which it was appointed to take effect would have been rendered by the deaths of them all in her lifetime, impossible; so that *quacunque via* the limitation over, though good in its creation, would then have become abortive—such share would be *her's* absolutely and indefeasibly, and to be disposed of accordingly. 2 Keen 590, *Jackson v. Noble*; 2 Collyer 124, *Eaton v. Barker*; 11 Johns Rep. 337, *Jackson v. Staats*; 4 Richards. Eq. Rep. 262, *Lowry v. O'Bryan*; 5 Richards. Eq. Rep. 202, *Perry v. Logan*; 1 Jarm. Wills 750-752, 782-784; 2 Jarm. Wills 711-712. From which it results, that, so soon as she should have survived all her brothers and sisters, her share would have been disposable at her pleasure, and even any previous disposition of it would have then become forever afterwards valid. 6 Hill's N. Y. Rep. 611, *Waldron v. Gianini*. Consequently the free, unfettered alienation of any part of the testator's estate, could under no circumstances have been postponed, by reason of the limitation over in the ninth clause of his will, beyond the life of the longest liver of his children mentioned in it. And therefore the limitation over is clearly within the allowed limits and good. See 2 P. Wms. 688, *Stanley v. Leigh*; 1 Sand. Us. & Tr. 4th edit. 196.

It remains to give answers to some authorities, which (perhaps) may be pressed against me.

1. The counsel in opposition to the limitation over, in the court below, relied much upon the case of *Campbell v. Harding*; 2 Russ. & M. 390.—That case has been already cited, and referred to the proper ground of the decision; which is stated, with admirable clearness, in the reported argument of counsel, (18 Cond. Engl. Chanc. Rep. 95-96,) thus: Here the gift over, if Caroline died without lawful issue, was to the testator's nephews and nieces living at the time,—living, that is, at the time of the failure of her lawful issue. That limitation was

certainly too remote, for, as it was descriptive of a class in terms large enough to include all after-born children of the testator's brothers and sisters, [3 Sim. 492, *Balm v. Balm*; 1 Rep. Leg. 4th edit. 45 *et seq.*;] it would, if it were allowed to operate, suspend the time of vesting beyond the period of lives in being, and, possibly, also beyond a period of twenty-one years afterwards.* *Jee v. Audley*, 1 Cox's Chanc. Cas. 324; *Leake v. Robinson*: 2 Meriv. 363; *Bull v. Pritchard*, 1 Russ. 213; *Palmer v. Holford*, 4 Russ. 403." And upon this impregnable ground Lord Brougham should have been, it is by no means certain that he was not,—content to base his decision. Jarman, in such matters a greater authority than he, (see 7 Law Mag. 174-175, 348-378; 13 Law Mag. 278-280; 15 Law Mag. 146-149;) manifestly treats it as resting,—at any rate as capable of being properly rested,—upon none other. 2 Jarm. Wills 365-366, 448-449.

So viewed, the case is altogether inapplicable. But it was insisted, that Lord Brougham, in his judgment, had laid no stress upon the consideration so prominently brought forward by the counsel, and that if the limitation over had been, in that case, as it is in this, to members of a class incapable of receiving an augmentation of its number after the death of the testator, his decision would have been still the same: for that he would have held the failure of issue to be then merely restricted within the life of the longest liver of the class, and not tied up to the death of the first taker, which latter was expressly declared by him to be an indispensable requisite. 13 Cond. Engl. Chanc. Rep. 96. On the other hand, I submit, that from his asserting in the same judgment the validity of limitations over, for life, or of an estate held *pur auter vie*, or to a survivor, upon a dying without issue not confined otherwise within any limits, (13 Cond. Engl. Chanc. Rep. 98-99,) we have fair ground for inferring that in the case supposed, he would have considered the limitation over to be upon a failure of issue at the death of the first taker, and therefore even upon his own view of the law valid. And if in this I am sustained, it relieves us altogether of the case of *Campbell v. Harding*: If I am not then there is against me an opinion of Lord Brougham, not plainly declared, but conjectured at best,—delivered, if at all, in a case which clearly did not call for it,—opposed irreconcilably to solemn decisions in at least four cases which have been cited, besides *dicta* to the same effect of Lord Kenyon, (1 Cox's Chanc. Cas. 326, *Jee v. Audley* :*) and Sir

*Lord Kenyon's *dictum*, as reported, is in these words: "The words (of the will in *Jee v. Audley*) are (I give £1000 unto my niece Mary Hall, and the issue of her body lawfully begotten and to be begotten and) in default of said

Wm. Grant, (2 Meriv. 391, *Leake v. Robinson* :)—and resting necessarily for its support upon an assumption, which neither principle nor authority sustains, and with which expressed opinions of Jarman, (1 Jarm. Wills 256, note n: 2 Jarm Wills 448-449,) and Judge Green, (5 Rand. 312, *Broadbuss v. Turner* :) are in direct conflict. Moreover the ground of the assumption, as Lord Brougham himself explained it, is demonstrably fallacious.

The position is, that if personalty be bequeathed to one, and upon his dying without issue to another, the bequest over is void, if the failure of issue of the first taker be not tied up to the time of his death, "in cases of this description;" by which last words I understand Lord Brougham to have meant to exclude executory bequests upon a dying without issue that should live to attain the age of twenty-one years, or the like, (as to which see 1 Bro. C. C. 147, *Heath v. Heath* : Butl. Fearn. 434, note K: 3 Lom. Dig. 1st edit. 281; 12 Leigh. 376, *Wright v. Cohoon* : 2 Brokenb. 119, 123, *Maxwell v. Call* : 5 Humphr. 505, *Booker v. Booker* : 2 Rop. Leg. 4th edit. 1546 : and the ground of it is, that if the subject were realty, such a limitation over would create an implied estate tail in the first taker, and "consequently," would give him in personalty "an absolute interest discharged of all limitations over." 13 Cond. Engl. Chanc. Rep. 96.

Now, though where personal property is given in a form of limitation, which if applied to real estate, would create an estate tail, the donee takes an ownership, which for want of some more apt designation has been called "an absolute interest," (2 Jarm. Wills 489-491, 504, 506 : see Butl. Fearn. 463 ; 1 Leigh 420, *Jiggetts v. Davis* : 12 Gratt. 143-144, *Moore v. Brooks* :) and a bequest simply ulterior to such gift, limited in the manner of a remainder to take effect whenever the line of issue of the first

issue, I give the said £1000, to be equally divided between the daughters then living of John Jee and Elizabeth his wife.' If it had been to 'daughters now living,' or 'who should (shall) be living at the time of my death,' it would have been very good," &c. As it stands, this *dictum* affirms a proposition which certainly Lord Kenyon would never have acknowledged for sound law. What he did mean, (as is manifest from the context,) and probably said, is this: "If it had been to the daughter then living (of those 'now living,' or 'of those who shall be living at the time of my death') of John Jee and Elizabeth his wife," it would have been very good, &c. And accordingly thought Jarman in his edition of Pow. Dev. (1 Jarm. Pow. Dev. 238, Law Library edit., note 1,) imputes to Lord Kenyon, in effect, the doctrine of *Timberlake v. Graves*, and our other cases of that class, by taking his *dictum* literally, as reported; yet, on the sober second thought, in his work on wills (Vol. 1, p. 256, n.) he tacitly withdraws that imputation, and understands the *dictum*, as it was manifestly meant.

donee shall have run out is void; yet this is *not* in "consequence" of the fact, that, had the subject been realty, he would have had an estate tail; but rather in spite of it, for a limitation after an actual estate tail is in England, and was here "aforetime," valid as a remainder.* In the case put, the limitation over is void, simply because, like any other limitation over after an indefinite failure of issue, it violates the legal prohibition against perpetuities, (see 8 Gratt 348, *Nowlin v. Winfree*: 3 Ire. Eq. Rep. 381, 384, *Ferrand v. Howard*: 2 Brokenbr. 124, *Maxwell v. Call*: 1 Steph. Comm. 565; Butl Fearn 460-461;†) a limitation over, framed so as not to violate that prohibition, is, though subsequent to such a gift, valid,—and in that case the prior donee does *not* take discharged of all limitations over." This has been settled by very many decisions upon the precise point,—in cases where the first gift was in the terms of an express estate tail (Carth. 266, *Lamb v. Archer*: Comb. 208; Skinn. 380; 1 Salk. 225, *S. C.*: 1 Eq. Abr. 193, *Fletcher's case*: 2 Atk. 647, *Paine v. Stratton*, cited and commented on by Lord Hardwicke; 9 Ves. 397, *Crookè v. De Vandres*: 1 Madd. Rep. 467, (1st Americ. edit. 253,) *Lyon v. Mitchell*: 1 Keen 486, *Radford v. Radford*: 2 Call. 313, *Higgenbottom v. Rucker*: 1 Bail. Eq. Rep. 48, *Mazyk v. Vanderhurst*: 18 Alab. Rep. 132, *Flinn v. Davis*:)—in cases where an estate tail in realty would have been created under the operation of the rule in *Shelley's case*, (2 Eden 203-204, *Taylor v. Clarke*: 2 Younge & Coll. C. C. 484, *Mansell v. Grove*: 24 Engl. L. & E. Rep. 275, *Darley v. Martin*: 13 Comm. Bench Rep. 683, *S. C.*: see 6 Gratt. 27, *Pryor v. Duncan*: 3 Lom. Dig. 2nd edit. 435; 2 Lom. Ex'rs, 2nd edit. 137;)—and in cases where such an estate in realty would be created by implication from the terms of the gift over, as where, after a gift to the first taker indefinitely, (3 P. Wms. 258, *Atkinson v. Hutchinson*: 2 Ball & B. 435, *Foley v. Irwin*: 1 Dev. & B. Eq. Rep. 466, *Clapp v. Fogleman*: see

* The true doctrine is stated in 3 Lom. Dig. 1st Edit. 207, 8, last paragraph of § 26, § 29, and first and last paragraphs of § 30, the whole of which is taken, with slight verbal modifications, not affecting the sense, from Cruis, Dig. tit. 38, ch. 19, §§ 8, 13, 14, 17; vol. 6, pp. 394-396, White's edit.; vol. 3, pp. 478-481, Greenl. edit.; and also in Shepp. Touchst. 271, note 1, Athert. edit.

† "A term for years shall not be limited to create a *perpetuity*. And the trust of a term shall not be limited, nor the limitation allowed in equity, further than the term may be limited by law. And therefore a limitation of the trust of a term, after the dying of any one, without issue, is void. As if the limitation be to a man till B. (another man) dies without issue, and then to C., the limitation to C. is void. Or W. A. and the heirs of his body, and afterwards to B." Com. Dig. tit. Chancery, 4 G. 2.

1 Russ., 262, *Green v. Wood*;) or to him and his heirs, (2 Durnf. & E. 720, *Goodtitle v. Pegden*; 1 Call 338, *Dunn v. Bray*; 3 Desauss., 256, *Cudworth v. Thompson*;) there was a gift over, if he should die without leaving issue; which in dispositions of realty, as has been before pointed out, is construed as importing an indefinite, but, in dispositions of personalty, a definite failure, of issue of the person referred to. 2 Jarm. Wills 418-419. In the leading case of *Eorth v. Chapman*, 1 P. Wms. 663, the limitation over did create an implied estate tail in realty, and yet, from the difference of construction, the very same words applied to personalty, disposed of in the very same clause, made a valid bequest over of it.—S. P. 9 Ves. 197, *Crooke v. Devandes*, 3 Paige 9, *Rathbone v. Dyckman*; 1 Desauss. 183, *Beresford v. Elliott's ex'ors*; see also 4 Maule & S. 61, *Dansey v. Griffith's*; 26 Engl. L. & E. Rep. 302, *Bamford v. Chadwick*; 14 Comm. Bench Rep. 708, *S. C.* And divers other expressions there are, which have a like difference of effect, when applied to realty, and when applied to personalty, (compare 2 Jarm. Wills 420-454; and see Butl. Fearn 471 *et seq.* particularly p. 485, also 2 Mun. 490;) though never, perhaps, when applied in the same sentence to both. See 2 Vern. 324-325, *Royall v. Eppes*; *Richards v. Bergavenny*; 1 Meriv. 271, *Brouncker v. Bagot*; 19 Ves 574, *S. C.*; Jacob 468, *Genery v. Fitzgerald*; 8 Sim. 22, *Simmons v. Simmons*, 11 Cond. Engl. Chanc. Rep. 304, *S. C.*; 1 Leigh 339, *Griffith v. Thomson*.—Such in England, is (as it seems) the phrase of “surviving” or “survivor;” which there would probably create in realty an implied estate tail, with a remainder, Cro. Jac. 695, *Chadock v. Cowley*; Butl. Fearn 478, note s, *Roe v. Scott*;) would give in personalty “an absolute interest,” not “discharged from,” but subject to, an executory bequest over, (2 Myl. & K. 441, *Ranelagh v. Ranelagh*; 2 Collyer 331, *Turner v. Frampton*;) and perhaps would operate in a conjoint disposition of both, as it did here in the case of *Nowlin v. Winfree*, 8 Grat. 346.

No doubt, what Lord Brougham meant was this,—that where a limitation over, expressed in terms which have, whether applied to realty or to personalty, the *same* legal signification would create by *implication* an estate tail in the former, there such limitation over of the latter is, *quoad* the contemplated beneficiaries of it, void; and with that proposition none of the cases just now cited do, in terms, conflict. But, in order that it may not be nugatory for the purposes of the argument I am answering, it must be carried further, and must assert that such limitation over of personalty is void, though limited upon a failure of issue of the first taker tied up,—not to the time of his death, for that

would not create any implied estate tail in realty,) 1 Jarm. Wills 490; 2 Bos. & P. 224, *Doe v. Wetton*; 12 Leigh 376, *Wright v. Cohoons*;)—but within a life or lives in being at the death of the testator, which, according to some *dicta* that are extant, would; and *with the proposition thus stated* THE PRINCIPLE of all those cases is at war: For they prove that an executory bequest upon a contingency *not* TOO REMOTE is valid, though it be limited after another bequest of the same subject in such terms as would, were it realty, create in *any manner* an estate tail in the first taker; and this, even though there be *no means of preventing the contingency being* TOO REMOTE, that is to say, upon an absolutely indefinite failure of issue, *except by putting UPON THE SAME WORDS, sometimes IN THE SAME SENTENCE, a meaning in application to personalty, DIFFERENT from that which, wherever they are applied to realty, is affixed to them.* If, agreeably to what seems to be the opinion of Judge Lomax, (3 Lom. Dig. 1st edit. 209-210-211-282;) and as has been actually decided, in a case to be more fully noticed hereafter, (*Dyer* 354 a pl. 33, *Anon.*;) such a limitation over would not create an implied estate tail in realty, then it stands clear of even the doctrine of Lord Brougham, or the doctrine (if it be not his) which the argument I am answering imputes to him.

Upon principle, apart from all authority, what conceivable difference can it make, in regard to limitations over of personalty, whether they be upon a failure of issue of the first taker, in any generation after him, or at any distance of time from his death, or upon any other imaginable contingent event, since, in no manner whatever, can, or ever could, his *issue* take in the one case any more or any otherwise than in the other? In all cases the true question is only, whether the limitation over is, *by its own terms*, to fail altogether, unless the contingent event it depends upon, *whatever that may be*, shall happen within the limits already described as to remoteness. See 1 Leigh 421, *Jiggetts v. Davis*.

2. In the court below, the counsel on the same side (in opposition to the limitation over) relied also much upon the case of *Hope v. Taylor*, 1 Burr. 268, reported better in 2 Ld. Keny. 9; chiefly from the manner of Judge Carr's introducing it into his opinion in *Bells v. Gillespie*, 5 Rand. 278-279. But in that case, as was correctly remarked in *Wilkes v. Lion*, 2 Cowen 364, there *was* not,—and there could not be,—any question as to the effect of a devise over. An illiterate testator had bequeathed pecuniary legacies to several children of his sister, and to her husband, and devised real estate to some of her sons without any words of inheritance, giving to one of them nothing but real estate, and had then added, according to Lord Kenyon's report,

"if either of these persons die without issue, then their said legacies to be equally divided amongst them that survive;" according to Burrows, "if either of the persons before named die without issue lawfully begotten, then the said legacy shall be equally divided between them that are left alive." One of the devisees died, leaving a son, against whom the heir at law of the testator brought an ejectment, claiming to be entitled as a reversioner after an estate for life only devised to the father of the defendant; and the only serious question in the case was, whether the word "legacies," according to the one report, or "legacy," according to the other, was applicable to the devise to him: For, if it was, (as to which, see 2 P. Wms. 186, *Beckley v. Newland*; 1 East. 37, note b, *Williamson v. Hurst*; 1 Dougl. 40, *Brady v. Cubitt*; 5 Durnf. & E. 716, *Hardacre v. Nash*; 3 Lom. Dig. 1st edit. 155-160;) the counsel for the lessor of the plaintiff conceded, (1 Burr. 271,) and the court assumed, (ibid.; 2 Lord Keny. 12;) that the devisee took an estate tail. This latter point was not at all discussed or explained. It seems, however, sufficiently clear, that the implication of an intention in favour of the issue, which enlarged into an estate tail what otherwise would have been only a life estate, (according to the rule of construction then settled, but now subverted, in England, 2 Jarm. Wills 170, 184;) could be neither strengthened nor weakened by considering the limitation over (out of which such implication arose) as either dependent upon, or independent of, the contingency that at the failure of such issue, peradventure long after the death of the first taker, there should "be left alive," or "survive," some one or more of the other persons named in the will. That consideration would affect the character of the remainder, by making it either contingent or vested; but it could nowise affect the purpose of the testator, to postpone it till issue of the first taker should have become extinct, nor the legal consequence of that purpose, in producing an enlargement of the prior estate. 1 Jarm. Pow. Dev. 188, (Law. Libr. edit. 110,) note 2; 3 Call 354, 361, *Tate v. Tally*, see 13 Grat. 294-295, *Tinsley v. Jones*. If the devise to the first taker had been to him and his heirs, the state of the case would have been more relevant to Judge Carr's purpose in citing it; for then there would have been room for mooted the point, whether, in view of the limitation over, the devisee had a fee simple subject to an executory devise, or an estate tail with a remainder grafted on it. Even then the point could have been only mooted; for, whether his estate was a fee simple, or a fee tail, either way the want of title in the lessor of the plaintiff would have been fatal.—And finally, had that question been presented under circumstances properly raising it, and

decided; then, with reference to the unequivocal nature of the word "survivor," as understood at that time in England, especially with regard to real estate, it might be material to enquire which of the two reports sets out correctly the very words of the will. Upon that point, Burrow's own report of the argument (1 Bur. 269,) affords evidence that Lord Kenyon's statement is the more accurate.*

* See 32 Engl. L. & E. Rep. 575. *Butt v. Thomas*; 36 Engl. L. & E. Rep. 571, S. C., in the Exchequer Chamber, where the limitation over was to survivors. In the fifth London edition of Burrow, there is a *quære*, subjoined to the marginal abstract of *Hope v. Taylor*. Respecting that case there has been, first and last, remarkable blundering. In 39 Engl. L. & E. Rep. 321, *Windus v. Windus*, Lord Cramworth, C., speaking of it (upon the point of construing "legacy" so as to mean "devise," says, after stating it from Burrow's report: "The question was whether the devisees took estates tail or estates in fee, and the court held that they all took estates tail, for that "legacy," by the context must refer to the devise of the real estate, for as to one of them, at least, there was nothing else it could refer to; and as to the others, it was impossible to suppose that it was meant to refer (only to so much as was personal estate, of what was given) to them, when you take into account that it was to go to them and the heirs of their body, and was to be settled, for life, with remainder to their issue, when one of them (the sister's husband) took only five pounds." Now, 1st., no question at all was raised, whether the devisees took in tail or in fee. None such could arise, since the defendant was both heir in tail and heir general, of the particular devisee, whom he claimed under (as both reports of the case distinctly state, 1 Burr. 269, 2 Lord Keny. 10) and therefore he must succeed if the will gave any descendible estate to his ancestor; and in point of fact, it was argued by counsel and assumed by the court, without argument or dispute, that if the limitation over applied at all to the realty, the will gave to the devisees an estate tail—what the plaintiff's counsel contended for being that the limitation over did not so apply, and therefore, that the devisees took estates for life *only*. 2nd. None of the devises was to the devisee and the heirs of his body. 3rd. Nor was there any direction to settle it at all, much less to settle for life, with remainder to issue. Had either of these features existed in the case, as to the particular devise in question, it would have been needless to inquire whether "legacy," as used in the will, meant "devise;" as it would have been impossible to contend, that the defendant was not by force of such feature entitled, either as heir of the body or remainderman. Indeed, we cannot but suspect some gross misreport of his lordship's expressions. And this leads us to remark that in *Hope v. Taylor*—Burrow reports Lord Mansfield to have said "it would not be a legal limitation, if confined to money;" whereas the same *dictum* is reported by Lord Kenyon, with manifestly more correctness, as follows: "Apply this to the land, and it will operate and pass an estate tail indefinite, to the respective devisees, but if applied to the money, it would be void, unless construed definitely and confined to dying without issue at the time of their respective deaths." And yet even this report does not perhaps represent accurately what fell from his Lordship upon this point. For in Burrow's report, it appears further that

3. The case of *Carter v. Tyler*, 1 Call 165, upon Judge Carr's exposition of it in *Bells v. Gillespie*, 5 Rand. 280-2-2, has an appearance of being adverse to me; but an examination of the case itself shews, that it is not.—That the limitations to the first takers respectively gave each of them an estate tail in the land devised to him, was on all hands agreed; as appears not only from the report, but also from the declaration of Wickham, in a subsequent case, who was one of the counsel that argued it, “the case of *Carter v. Tyler* was not a case of construction, but merely as to the effect of the Act upon an acknowledged entail.” 3 Call 358, *Tate v. Tally*. And so plain was the point taken to be, that no person concerned in the case, either at the bar or on the bench, appears to have made any suggestions as to the ground on which it was so. Judge Coalter, in *Broadbush v. Turner*, 5 Rand. 317, said that “the estates of the first takers were to them, and the heirs of their bodies,” so that “it was a direct and express fee tail.” In this statement respecting the words of the will, he was mistaken; for the limitation was to each of the testator's sons “and his heirs lawfully begotten forever,”—not saying “of his body;” but the effect of these words *per se*, towards creating “a direct and express fee tail,” was precisely the same. In favour of this proposition there are numerous clear and pointed authorities; Moore 637, *Church v. Wyat*: Hargr. Co. Litt. 20 b, note 2; 1 Thom. Co. Litt. 520, note 13, *S. C.* from Hale's MSS.; Com. Dig. tit. Devise, N. 5; 1 Ves. sen. 521, *Barret v. Beckford*: 3 Binn. 374, *Hall's lessee v. Vandergrift*: 7 Taunt. 85 *Nanfan v. Legh*: 2 Ch. Marsh. 107, *S. C.*: 7 Rep. 42 a, note A to *Beresford's case*, Fraser's edit.; 2 Jarm. Wills 280; while I do not find, and the diligence of the counsel who argued the precise point in the two modern cases of *Hall's lessee v. Vandergrift* and *Nanfan v. Legh*. did not produce, even so much as a *dictum* of any court, single judge, or text-writer against it.* And, with

he said, in the same connection, “a different construction has sometimes been put upon the very same words, as applied to money and lands, in order to support the intent of the testator, as in the case of *Forth v. Chapman*, by Lord Macclesfield,” 1 Burr. 272, 2 Lord Keny. 13. From all which, put together, it seems inferable, if any reliable inference can be drawn from *dicta* so loosely reported, that whatever was the precise form of the limitation over, in that case, Lord Mansfield thought, if he did not say, that it imported a definite failure of issue, if money was the subject matter, but an indefinite failure, if it was land. Perhaps, however, the only sound observation (in this view of the case) that can be made upon both the reports is, that they prove how little dependence in regard to nice points can be safely put upon any *dicta* not reported from the manuscript of the judge himself, who has uttered them.

* In *Moore v. Brooks*, the point was mooted, 12 Grat. 143, but not decided, as its decision was unnecessary.

this key, the solution of the whole case is easy and simple. It establishes these conclusions, and these only: 1. That the limitations of the will gave to each of the first takers an estate tail, on some ground unexplained, but which ought to be taken to have been the most obvious, and that is the one just now stated; it is, however, immaterial to my present purpose, whether it was so held upon this ground, or upon that on which *Sydnor v. Sydnor* and *Bells v. Gillespie* were, and *Broaddus v. Turner* may have been, decided: 2. That all subsequent limitations, therefore, were remainders, either vested or contingent; agreeably to the rule in *Purefoy v. Rogers*, 2 Saund. Rep. 388, repeated since innumerable times, (very often by our own Judges, as in 5 Rand. 276, *Belles v. Gillespie*: 319, *Broaddus v. Turner*: 1 Leigh 402, 418, *Jiggetts v. Davis*; 4 Leigh 123, *Thomason v. Andersons*: 13 Grat. 165, *Baylor's lessee v. Dejarnette*;) and never (advertently) departed from: 3. That as remainders, whether vested or contingent, they were barred by the statute which converted into fees simple the estates tail that supported them: (see 13 Gratt. 298, *Tinsley v. Jones*;) and 4. That what before the statute would have been a contingent remainder should not after it, for the sake of evading this result, be converted into an executory devise, although it were so limited as that it would have been a good executory devise, if the preceding estate had been under the will, a fee simple. (S. P. 2 Comst. 355, *Lott v. Wykoff*: 1 Barb. S. C. Rep. 565, *S. C.*) Upon these grounds the limitation over, if both of the testator's sons should "die without issue lawfully begotten," in favour of his daughters "then living and their heirs forever," failed. But the special reason of its failure prevents the case being an authority against me; while, on the other hand, a *dictum* of Judge Pendleton in it is an authority (of the grade of a *dictum* of his) in my favour. Judge Carr, in his comments upon the case, has pointed out, 5 Rand. 281-282,) that "then living" meant "living at the death of the sons without issue;" and Washington in arguing it contended, that as this would have made a good executory devise, if the will had given to the first takers a fee simple, so it must have the same effect when the statute turned into a fee simple the estate tail the will gave them: Upon which Judge Pendleton made this remark, (1 Call 186;) "it only remains to consider Mr. Washington's great fort, that this devise may be supported as an executory devise, consistent with William Champe's [who was one of the first takers] having a full and absolute fee simple under the Act: and if he could have proved this, he would have succeeded."

4. In *Broaddus v. Turner* the devise to the testator's two

sons, who were the first takers, was in the terms of a fee simple, "to them and their heirs forever;" and then the will proceeded in these words, (5 Rand. 310;) "But, in case either of my said sons should die without issue lawfully begotten, then it is my desire the survivor should have the whole. But, if both my said sons should die without lawful issue, then it is my desire my said land be sold by my executors to the highest bidder, and the money arising therefrom be divided among my daughters then living; and if, in case any of them should be dead and leave children, then in that case it is my desire that the children of the deceased have an equal share with those living, so that each child or their children have an equal part." Detailed reasons for that which turned out to be the judgment of a majority of the court, were delivered by only one Judge; who said, "the terms of the will certainly do not make it a condition, that there should be no issue of the sons living at *their* deaths, in order to give effect to the [ultimate] devise over. The sons might have died leaving issue surviving them, which might have failed in the lifetime of one of the executors, or of one or more of the daughters; and in that event it was clearly the intention of the testator, that the devise over should take effect, [—the *special* being here preferred to the *natural* signification of the words "die without issue." If it was the intention, that the limitation should *not* take effect *but upon* the condition, that the issue of the sons should fail in the lifetime of the executors or of one or more of the daughters, it might be good as an executory devise; being to take effect within a life or lives in being. But I do not think that the will is susceptible of this construction." He then assigns his reasons for this opinion, and concludes that discussion thus: "The testator intended, that whenever the issue of his sons failed, the *children* of his daughters, if *they* [the daughters] were *all* dead, should succeed to the property, in the same proportions to which their mothers would have been entitled, if alive." In which view of the will the limitation over was, for the same fault as the limitations over in the cases before mentioned of *Jee v. Audley*, *Campbell v. Harding*, and *Deane v. Hansford*, according to Judge Cabell's view of the last mentioned. "If, however," continues the opinion I have been quoting from, "the ultimate limitation was to take effect, if at all, within a life or lives in being, and was therefore good as an executory devise," supposing it to be limited upon a fee simple; "yet the estate given in terms to the sons [to them and their heirs forever] was reduced to a fee tail, by force of the express cross-remainders in fee limited to them." And upon this ground, under the rule in *Purefoy v. Rogers*, which he cites, and agreeably to the decision in *Carter v. Tyler*,

Judge Green was of opinion that the ultimate limitation over, whatever might be its import, must at any rate be regarded as a remainder, and consequently be defeated by the statute. From Judge Carr's brief reference to *Carter v. Tyler* and *Sydnor v. Sydnor*, it seems probable that he rested his decision upon the latter ground. Judge Cabell's concurrence was general. Judge Coalter dissented. Upon whichever of the two grounds the case was decided, it manifestly cannot be an authority against me; not if decided upon the ground last mentioned, for the same reasons that have been assigned in reference to the case of *Carter v. Tyler*: nor if decided upon the ground first mentioned, because in our case the limitation over is to "them that are living" of persons already mentioned by name in the will. And as I was able to claim the benefit of a *dictum* of Judge Pendleton in the case of *Carter v. Tyler*, so I may here claim the benefit of the opinion of Judge Green, who, in the case of *Broadbudd v. Turner*, manifestly thought that the limitation over would have been within the allowed limits of executory devise, if it had been confined to the testator's daughters, and had been in favour of such of *them* (only) as should be living when his posterity by his sons was extinct.

5. Precisely similar observations are applicable to the case of *Griffith v. Thomson*; 1 Leigh, 321; where a limitation over after a dying without heirs,—which appeared by the context to mean a dying without issue,—“to my father's brothers that are alive, and the heirs of those that are dead receiving no more among them than my father's brothers would have received had they been living,” was explained in like manner. “It is clear,—that the expression used in relation to the brothers of the testator's father ‘who are alive,’ meant such as might be alive, upon the death without issue, of all those who were to take before them; and that this expression was intended, not to prescribe, as a condition upon which the limitation over was to take effect, that some one or more of them must be then alive, but the mode in which those alive, *if any*, and the descendants of those dead, or of *all, if all were dead*, should take.” 1 Leigh 334.—In this case, it is true, Judge Carr used an expression (1 Leigh 332) which, if construed without reference to the particular circumstances before him, might indicate that he had conceived a notion similar to that opinion, or imputed opinion, of Lord Brougham, which I have already combatted. If such was the fact, he certainly had not the concurrence therein, of any of his associates; not of Judge Green, who explained his own views, in the same case, (1 Leigh 334, 335,) and as we have seen, in *Broadbudd v. Turner*; nor of Judge Coalter, who dissented, even in the case last mentioned, and in that of *Bells v. Gil-*

lespie : nor of Judges Cabell and Brooke, neither of whom sat in this case, but both of whom adhered to the last to the decisions in *Timberlake v. Graves* and the other cases of that class,—at least, never surrendered them. 9 Leigh 260-1, *Deane v. Hansford*.

6. The obscure case of *Kendall v. Eyre*, 1 Rand. 288 (where the marginal abstract omits almost the whole of four lines of the will, to be found on p. 290) was decided upon we know not what ground, but nevertheless appears sufficiently to be altogether inapplicable; for the words “equally divided amongst all the others of my children, if they should be living,” (pp. 289-90,) relate not to any dying without issue, but to a prohibited sale of the property. Besides, even then, the division was not to be confined to such children of the testator as should be living when it happened, but was, in case of their deaths, to be extended to their lawful issue “so long as there” should be “a child or *grand-child* to represent” them; which, if this limitation were upon a dying of any of the first takers, without issue, would bring the case within the principle of the case of *Griffith v. Thomson*, as explained just above, and that of *Broaddus v. Turner*, so far as those two are coincident; it being, as before noticed, the principle of *Jea v. Audley* and the other cases of that class.

7. One other case there is in our reports, wherein the words “then living” occurred in a limitation over, I mean *Jiggetts v. Davis*, 1 Leigh 368-429; but that case, likewise, is distinguishable from this. There the testator gave his whole estate, in moieties, to his wife and daughter, with cross-remainders between them, if either died without issue and with a limitation over, if both died without issue, of the property (which was altogether personalty,) that came by his wife, to her brothers and sisters, who might be then living, and of the balance of his estate to his brother John and to his heirs, if any; with a further provision, that if his wife married again and had issue, (which event did happen,) the whole of the property that came by her should be hers absolutely: and the question in the cause being only in relation to the *land* devised, it was held that each of the first takers had an estate tail in a moiety with remainders dependant upon it, which, whether contingent or vested, were destroyed by the operation of the statute, as in the cases of *Carter v. Tyler* and *Broaddus v. Turner*. As to the words, in the contingent limitation to the wife’s brothers and sisters, “who might be then living,” it was held that they were inapplicable to any limitation but that, (*viz*: of the personalty, which came by her,) consequently could not affect the limitation of the land, and this latter limitation, being to the testator’s brothers, “or his heirs,” or in default of such, to his half

brothers, did not tie up the contingency within the allowed limits of executory devise, (1 Leigh 404-5, 427, 429,) as it certainly could not, upon principles and authorities, which have been already sufficiently set forth. Moreover, if the former and latter of these limitations could be considered as making together but one in reference to denoting the contingency contemplated, then this very association made the contingency too remote, on the principles of not only *Jee v. Audley* and the other cases of that class, but also *Barlow v. Satler*, 17 Vez. 479 and *Leake v. Robinson*, 2 Meriv. 363, and the numerous other cases constituting a class, of which that last cited may be considered as in some sort the representative, 1 Jarm. Wills, 226-234. And at any rate, inasmuch as other previous provisions had interposed estates tail in the land, the first limitation, no matter what was the nature of the contingency therein contemplated, must take effect by way of remainder and could not operate as an executory devise. This last is the ground upon which the distinguished reporter conceived the case to have been decided. See his marginal abstract and also the report of his argument, 1 Leigh 368, 379. In delivering his opinion in it, Judge Carr said (1 Leigh 389) that it brought before the court "the question, so often debated, so often decided here: Whether a devise to A. and his heirs or to A. for life or for A. without words of inheritance, and if A. die without issue, to B., C., and D., or such of them as may then be living, gives an estate tail to the first taker?" And from this expression, it seems probable, perhaps even more than probable, that Judge Carr's own opinion, in not only that case, but also the previous cases of *Bells v. Gillespie*, *Broadbuss v. Turner*, and *Griffith v. Thomson*, either rested upon or was influenced by, his belief that an affirmative answer to the question so stated was the correct one. But it is every whit as probable, that not one of the other Judges agreed therein with him. For though the case certainly did not present that point, except in the sense that, *if it were law*, then it would inclusively decide the case, by the argument a *majori ad minus*, yet in this sense the point did arise, and if the other Judges had considered with Judge Carr, that it was perfectly settled, they would, at once and without difficulty, have decided the case upon that ground; whereas Judge Coalter held, in *opposition* to it, that the ultimate limitation was good by way of executory devise; and the only other Judges who sat in the case, Green and Cabell, explained the grounds of their decision in long and elaborate arguments, wherein they did not even so much as make any the slightest allusion to such a doctrine. In truth, as I conceive, after a most laborious and careful examination of all the cases on this head, I have been able to find, with even the help

afforded by the ample collection made of them in *Tinsley v. Jones*, 13 Gratt. 289-300, no case that has ever brought before this court, the question stated by Judge Carr, unless in the sense I have mentioned. None has ever decided it, and in none was it ever debated, unless by himself, in that of *Bells v. Gillespie*. In any different sense, there is no pretext for saying that it could have arisen in any case to be found in our reports, except *Carter v. Tyler*, *Kendall v. Eyre*, *Broadbuss v. Turner*, *Griffith v. Thomson*, and *Jiggetts v. Davis*; and in none of them did it arise, for the reasons I have stated in severally discussing each.

Nor can I find elsewhere anything in the nature of authority properly so called, to sustain this opinion of Judge Carr, where the devise is to A. and his heirs, but on the contrary much that opposes it. A *cestui que use*, in the 12th year of Edward the Fourth (A. D. 1472) before the statute of wills, but when uses were devisable, devised the land to his son, to have and to hold to him and his heirs forever, provided, however, that, if he died without issue, or *the issue failed*, living his executors, ("*a aver et tener a luy et ses heires a tous jours, proviso tamen que sil devy sans issue ou issue faile vivant ses executors,*") the land should be sold by the executors. And in Mich. 18 and 19 Eliz. (A. D. 1576,) upon a formedon, brought by the heir of the body of the devisee, claiming in the writ and court, under a gift of the land a tail, the court of Common Pleas, of which Dyer (the reporter of the case) was their Chief Justice, held that the devise did not create an estate tail, and decided against the demandants. Dyer 354 a pl. 33, *Anon.* In the margin of Treby's edition, there is a note, from MSS. of a case called in the original, *Pell and Browne's*, in Vaillant's translation *Pells and Browne's*, which is there said to have been "adjudged upon this book of Dyer." This statement is confirmed? by the reports of the case so cited, in 2 Roll. Rep. 196, 197, 216, 223, and in Cro. Jac. 590-3, in the former of which it is said that "all the judges relied upon the books of 18 and 19 Eliz. (Dyer) 354 and 2 and 3 (Ph. and) Mar. Dyer 124; and they all agreed (in the original the word is "*disagree*," by one of those misprints, so common in that volume, more particularly of Rolle) that the case, in 18 and 19 Eliz., Dyer 354, was *terminus terminans*, with our case, and in the latter that the Judges "all relied upon the books of 2 and 3 Ph. and Mar. Dyer 124 and 10 (it should be 18 and 19) Eliz. Dyer 354, which are *all one*, with this case.* To the same effect are nu-

* In the case in Dyer the court did not decide that the devise over, in the

merous other authorities, referred to by me, near the beginning of this argument; upon the strength of which and of those now mentioned, I venture to submit, as a sound exposition of the law, the following extracts from text-books: "Dying without issue, or words (language) of similar import, where the time for the happening of the event is not confined to the period allowed by the rule against perpetuities, intending an indefinite failure of issue, creates an estate tail by implication," 2 Crabb on Real Prop. 1st Americ. edit. 29, note 3. But on the other hand "where, after giving the fee to A. the will proceeds to dispose of it otherwise, upon his death, without issue. taking place *within* a limited period, if that period be not too remote, the ulterior disposition will be considered as an executory devise defeating (in case the contingency happens) the fee first given, and not as a remainder expectant upon an estate tail, into which, that fee would, if necessary, have been contracted for the sake of supporting such disposition. Thus upon a devise to B. and his heirs forever, and if he died without issue *living* A., then to A. in fee; B. took a fee simple subject to be defeated, in the event specified, by the executory devise to A." Benton on Real Prop. 207. The case here put, is in fact that of *Pells v. Browne* itself, (2 Roll. Rep. and Cro. Jac. *ubi supra*; 1 Roll. Abr. 611, 835, 2 Roll. Abr. 394; Palm. 131; J. Bridgm. 1; Godb. 282,) which at first gave great dissatisfaction to some of the Judges and others of the profession, (Hutt. 60-1, *Howell v. Anger*: Styl. 274-5, *Jay v. Jay*; 1 Mod. 110-1, *Benson v. Hodson*, 3 Chanc. Cas. 19, *Howard v. Norfolk*; 4 Mod. 317, *Moore v. Parker*;) inasmuch that Powell, J., said it "went down with them like chopped hay," (11 Mod. edit. Lond. 1781, p. 287, *Scattergood v. Edge*, 12 Mod., 281 S. C.,) and still is unsatisfactory to one most able lawyer at least, 1 Jarm. Pow. Dev. 188, note 2; 2 Jarm. Pow. Dev. 574; 2 Jarm. Wills 430;) for having been decided in opposition to the principle which seems to have im-

contingency contemplated, was a valid executory devise. That question could never arise upon that will, the contingency contemplated having failed, by the debts of the executors, in the lifetime of the devisee, (as stated in the report,) who, moreover, left issue that had not failed at the distance of more than a century after the will was made. But the court did, *in effect*, decide the same thing, when it decided that the devise in fee to the first taker was not reduced to an estate tail. In 5 Rand. 312, *Broadbent v. Turner*, we find Judge Green stating that precise proposition, in apparent unconsciousness of the decision in *Dyer*: And though there is a *dictum* of that Judge in the same case, 5 Rand. 314, which, on a hasty view, might seem to countenance Judge Carr's opinion, here examined, yet it will be found when the precise terms of it are considered, to have no such tendency, much more when it is considered, with the rest of the judgment, of which it forms part.

pressed itself so deeply on Judge Carr's mind, but which is indubitably now not to be questioned. It is in the words of Hargrave, (2 Harg. Jurid. Arg. 33, 3 Harg. Jurid. Exercit. 32; 4 Vez. 251, *Kellusson v. Woodford*;) "generally looked to as the pole-star for direction, in executory devises of inheritance," and Lord Kenyon once called it "the foundation and as it were the *magna charta* of this branch of the law," 3 Durnf. and E. 146, *Porter v. Bradley*. To discuss Judge Carr's opinion in the other cases he puts, where the devise is to A. for life, or to A. without words of inheritance, understood to be a case governed by the old law, which required words of inheritance or something tantamount in order to pass more than an estate for life, would be foreign altogether from the purpose of this argument, as may be understood easily from what is said by Judge Moncre in 13 Gratt. 294-295, *Tinsley v. Jones*; and therefore, for brevity's sake, I will merely refer to Moore 464-465, *Bacon v. Hill*, and 3 Atk. 443, 449, *Trafford v. Boehm*, which are authorities adverse to that opinion. Jarm. Pow. Dev. Law Libr. edit. 110, note 2, a passage favourable to it, but omitted in Jarman's subsequent work on Wills, and 1 Jarm. Wills 487-488, and direct attention to a comparison of 2 Jarm. Pow. Dev. 564, with the corresponding portion of Jarm. Wills, vol. 2 p. 417.

To recapitulate, I contend—1. That the limitation over, upon the death without issue of any of the testator's ten children named in his will being to them (of the said ten children) that are living, (when that event happens,) the *legal* signification of an indefinite failure of issue, is in this case excluded; 2. That, therefore, the *natural* signification, of a death without issue living at the time of the death, must take place, because it is the natural sense, and there is nothing to shew that here the special signification was intended preferably by the testator; and 3. That even if the last mentioned sense is adopted, still the limitation over will nevertheless be good, because—(1) such a limitation of realty, given to one and his heirs forever, would not create therein an estate tail;—and (2) if this were otherwise, yet it would not, as a limitation of personalty, be therefore void.

In our case there was nothing for the limitation over to operate upon but personalty; to wit, pure personalty, and the proceeds of real estate directed by the will to be sold. See 2 Jarm. Wills 418; 5 Richards Eq. Rep. 202, *Perry v. Logan*; 3 Leigh. 109, *Callava v. Pope*; 13 Gratt. 293, *Tinsley v. Jones*. Such property was never capable of being entailed, (Harg. Co. Litt. 20 a note 5; 1 Thom. Co. Litt. 515, note 7; 1 Lom. Dig. 1st edit. 24-25;—unless slaves were regarded as such, and not

as realty under the Act of October 1705, (3 Hen. Stat. Larg. 333, ch. 23;) while by law they were entailable, (see Jeff. Rep. 132, *Herndon v. Carr*; 2 Wash. 1, *Walden v. Payne*;) a point not necessary to be considered in this case, since in Roger Abbott's will they were no way connected with any land, and long before the date of it, and also before the 7th day of October, 1776, (E. C. 1803, 1808, ch. 90, sec. 9;) they had ceased to be entailable unless in connection with lands likewise entailed, (4 Hen. Stat. Larg. 222, ch. 11;)—nor could there ever be limited of it a remainder properly so called, (Smith on Execut. Inter. 58-60; see Keyes on Chattels, § 268, 271; 4 Hen. Stat. Larg. 223, sec. 3; but at all times every testamentary disposition of it, after a prior gift, whether for a day, for a life, or forever, and whether depending or not upon a contingency, must have taken effect, if at all, by way of executory bequest. 8 Rep. 95 a, *Manning's case*; Butl. Fearne 401 *et seq.*; 1 Jarm. Wills 793; Smith on Execut. Inter. 54; 1 Leigh 420-421, *Jiggetts v. Davis*. Consequently there is, not only no necessary or actual, but also not even any possible, connection between the law of executory bequest and the law of entail; though some casual coincidences, resulting from no principle common to both, have been sometimes, too hastily, considered as indicating some such connection. Hence also the rule in *Purefoy v. Rogers* and the doctrine of *Carter v. Tyler*, which possess so commanding and controuling an influence in regard to the latter, have not, and cannot possibly have, any application to the former. And therefore while, on the other hand, a limitation over of realty, after an estate tail express or implied, in dispositions by will before 1 January, 1820, (when the law in this respect underwent an alteration by statute, R. C. 1819, ch. 99, sec. 25;) must fail in Virginia, though such limitation over be within the allowed limits of executory devise,—because, under the rule in *Purefoy v. Rogers*, it must operate as a remainder, and then, under the doctrine of *Carter v. Tyler*, it must be cut off by the statute; on the other hand; a like limitation of personalty,—more especially when not connected with a disposition, in the same terms, of realty,—must, under precisely the same circumstances, prevail.

It is possible (barely) that the case of *Martin v. Kirby*, 11 Gratt. 67, may be relied upon against me. But that case is inapplicable, for this reason among others: There the limitation over upon the death of the first taker was absolute, and certain from the beginning to take effect at that time; whereas here it was uncertain at the date of the will and at the death of the testator, whether the contingency would ever happen, in which alone it was to come into play; and in such cases the persons

to take as survivors must be surviving when the event happens. This, which is proved by numerous authorities before cited, is further sustained by the following: 3 Bro. C. C. 469, n., *Ferguson v. Dunbar*, stated 2 Rep. Leg. 4th edit. 1464; 5 Ves. 465, *Milson v. Awdry*; 2 Myl. & K. 441, *Ranelagh v. Ranelagh*; 3 Russ. 217, *Crowder v. Stone*; 3 Younge & Coll. Exch. Rep. 565, *Cormack v. Lumb*; 1 Collyer 108, *Taylor v. Beverley*; 13 Engl. L. & E. Rep. 475, *Moate v. Moate*; 31 Engl. L. & E. Rep. 529, *Carver v. Burgess*; 16 Mass. Rep. 241, *Hulburt v. Emerson*; 3 Barb. Chanc. Rep. 137, *Lovett v. Buloid*.

NOTE.—In *Roberts' adm'r v. Petty's adm'r et als.*, the Court of Appeals, on the 11th day of May, 1858, affirmed Judge Field's decree, sustaining the limitation over as valid; Allen, P., and Lee, J., dissenting. The former inclined to think, that the limitation was void, on principle; the latter inclined to think differently, but considered the point to have been decided by *Nowlin v. Winfree*, 8 Gratt. 346, from which, as having settled a rule of property, he thought the court ought not to depart, even if the decision was wrong. The other Judges concurred in an opinion delivered by Samuels, J.; holding the limitation over to be good on principle, and the case to be distinguishable from that of *Nowlin v. Winfree*; concerning the correctness of which latter, however, or the propriety of adhering to it, they did not further intimate what they thought.

EJECTMENT.

Oley vs. Cooper.

Circuit Court of Floyd County, Va.. April Term, 1858.

On cross-examination the witness can be interrogated only in relation to facts and circumstances, enquired into upon the examination in chief. If the opposite party wish to examine the witness as to independent facts, supporting his own case, he must recall the witness.

A witness is introduced by the plaintiff in an action of ejectment, and states that at a particular time the plaintiff was in possession of *part* of a certain tract. On cross-examination it is pertinent and proper for the defendant to ask the witness if another person, under whom defendant claims, was not at the same time, in possession of that part of the land which is in controversy.

The deposition of a witness is offered in evidence, on the ground that he is too old and infirm to attend the trial. The party offering to read the deposition cannot shew the condition of the witness on the day of trial; but the other party shews that, two days prior to the trial, the witness was many miles from home and in his ordinary health. The deposition cannot be read.

A record to which neither the plaintiff nor the defendant was a party, is not even *prima facie* evidence, (in ejectment,) against the defendant, that, the grantor in the deed to the plaintiff was heir at law of the grantee in the patent under which the plaintiff claims title.

Possession of part of a tract of land is not possession of the whole where there is an actual adverse possession of another part. *E converso*, possession of part is possession of the whole where there is no actual adverse possession of any part.

A junior patentee takes and holds actual possession of a part of the land embraced in his grant, claiming title to all included in his boundaries: the whole is embraced in an older patent, under which there has been no actual *seisin*: the junior patentee's possession extends to his boundaries and ousts the constructive *seisin* of the senior patentee from the whole tenement covered by the junior patent.

The plaintiff claims under the senior patent, but not being able to shew the legal title in himself, has to rely upon possession, held under the senior patent: to defeat the possession of the junior patentee the plaintiff must shew that he took and had actual possession of some part of the land inclosed in the junior patent.

Henry S. Otey brought ejectment in the Circuit Court of *Floyd* against *Samuel Cooper*. The declaration claimed 150 acres of land. Issue was made upon the statutory plea.

Staples, for the plaintiff.

Cook, for the defendant.

By consent, both parties exhibited their title papers before any other testimony was offered. This was done for the purpose of more conveniently applying the evidence to the matters in dispute.

The plaintiff's title was as follows. In 1796 a patent issued to *Austin Nicholls* for 45000 acres of land. In 1828 *John Belden* exhibited his bill against *Daniel Nicholls*, in the old District Court of Chancery at Wythe Court-House, alleging that *Austin Nicholls* had sold this land to one *Bostevick*, but had made no legal conveyance and was dead: that *Belden* had bought the land from *Bostevick's* heirs: that *Daniel Nicholls* was the brother and sole heir at law of *Austin Nicholls*; and praying a decree against *Daniel Nicholls* for a conveyance of the legal title to the land. The bill was taken for confessed, and the court decreed that *Harold Smith*, the marshal of the court, should convey the land to *Belden*. In 1831 *Smith* accordingly conveyed the whole tract to *Belden*. In 1834 *Belden* conveyed six hundred acres of this land to *Sowers*: in 1838 *Sowers* conveyed the 600 acres to *Jonathan Otey*; and in 1848

said *Otey* conveyed 150 acres thereof to the plaintiff; and this 150 acre parcel was the tenement claimed in the declaration.

The defendant's title was this. In 1798, a patent issued to *George Bishop* for 300 acres. In 1801 *Bishop* conveyed this land to *Altizer*; in 1817 *Altizer* conveyed it to *James Lester*, in 1850 *Lester* conveyed one hundred and eleven acres of this tract to one *Boyd*; and in 1853 *Boyd* conveyed this one hundred and eleven acres to the defendant. This parcel of 111 acres and the plaintiff's 150 acre tract *interlocked* with each other; though there was a portion of each which was not included in the other. There was a question as to the matter of fact whether the lines of *Bishop's* patent did include the 111 acre tract of the defendant, though there was no question as to the fact that it was embraced by the calls of *Altizer's* deed to *Lester* made in 1817. It was also clearly proved that all the land in *Bishop's* grant was included not only in the patent to *A. Nicholls*, but in the 600 acre deed to *Belden*, under which the plaintiff claimed.

The plaintiff introduced parol proof, tending to shew that the 111 acres claimed and held by defendant, was not included in the patent to *Bishop*—while it did form part of the 600 acres conveyed by *Belden* to *Sowers* and by him to *J. Otey*. He then introduced a witness, named *Skaggs*, by whom he proved that about the year 1834, *Jonathan Otey*, claiming under *Sowers*, had settled upon and taken, and since held possession of the 600 acre tract: and that about 1848 the plaintiff had settled upon and since held his 150 acre parcel, conveyed to him in that year by *J. Otey*, and demanded in his declaration. On cross-examination the witness stated that *J. Otey* had settled on the 600 acre tract, but outside of, and about a mile from the land held by the defendant; and that the plaintiff had settled upon that part of his tract outside of the defendant's tract. Thereupon the defendant's counsel asked the witness this question. "Was not *James Lester* in the actual possession of the land now claimed and held by the defendant, in the year 1834, and also in 1848; and had he not been in such possession ever since about the year 1817."

Staples objected to this course of examination. The rule is that cross-examination must be confined to the matters as to which the witness has been examined in chief. The defendant may examine our witness in relation to *our* possession; but he is restricted to that. He is now attempting to make out his own possession by our witness. He is, of course, at liberty to do so at the proper time, but not on cross-examination. To use him for this purpose the defendant must recall him and make him his own witness. We have not examined into the defendant's

possession. The rule is laid down in 1 Greenleaf, Sec. 445, p. 557.

Cook was not disposed to submit to the rule as laid down in Greenleaf. It was opposed to the whole English practice and doctrine; and it had not been adopted nor sanctioned in Virginia. But it was not in this case necessary to controvert the rule, for it was not applicable. We are not seeking to prove our case by this witness. We only want to defeat the effect of his testimony by shewing that the plaintiff's possession does not, and never did extend to the lands in controversy. Now, possession of part is possession of the whole, when held under a good title and there is no *actual* adverse possession. Per *Daniel J.* in *Anderson vs. Harvey*, 10 Grat. 396. See Code, chap. 135, sec. 19, p. 560. Here the plaintiff alleges that he holds under the senior patentee, and that he has entered upon and taken possession of part of the tract covered by the senior patent. This witness has proved such entry and possession, and the effect of his evidence, according to the plaintiff's view, is to extend that possession to the whole tenement. We only seek to draw from the witness such statements as will repel this conclusion, and shew that such entry and possession did not and do not affect the land in controversy. It is true that such evidence would tend to sustain our case; but it so sustains it by defeating the plaintiff. It is a two-edged sword; and it is no sufficient objection that it cuts our way when we have a clear right to use it in another.

FULTON, J.

I am inclined to adopt the rule as laid down by Greenleaf. It is true that I am not aware of any Virginia case in which the rule is so settled; but like so many other matters of familiar and constant occurrence, it has been prevented from going before our courts of the last resort by our peculiar system of procedure. I must therefore look to other quarters; and I think the balance of authorities is in favor of the proposition that the cross-examination must be restricted to the subject matter of the enquiry in chief. And I think that convenience requires an adherence to the rule. It is much easier and safer to require the party cross-examining the witness to recall him for the purpose of proving independent and disconnected facts, than to embarrass the time and confuse the jury by a simultaneous enquiry into the demand and the defence.

But I do not think the rule is applicable here. In this instance this witness has stated facts, tending to prove that, in contemplation of law, the plaintiff and those under whom he claims, had possession and *seizin* of the whole tenement, inclu-

ding the land in controversy. I think the unquestionable deduction from the statute and the authority, cited by *Mr. Cook*, and others which might be named, is that possession of part is possession of the whole, when there is *not* an actual adverse possession of any part. Suppose the statements already made by the witness to remain unqualified and uncontradicted, I should be compelled to instruct the jury that they afforded *prima facie* proof that since 1834, the plaintiff and those under whom he claims have been in possession of the land in controversy. Such would be the conclusion resulting from that testimony; and the defendant clearly has the right to repel that inference by shewing, from this same witness, that the possession did not extend to the land in controversy, because that land was then in the actual adverse possession of another. It does not affect the question to say that the defendant claims under the person holding such adverse possession; the main object of the enquiry is to exclude and repel the inference, arising from the testimony, in favor of the plaintiff. It may also have the effect of maintaining the defendant's case; but that is only a secondary consideration, and perhaps an unavoidable result. For the mere purpose of supporting the defendant's pretensions the evidence could not now be heard: to do that the defendant would have to recall the witness and examine him in chief; but to overthrow the plaintiff's case this is certainly a legitimate and pertinent enquiry. The question asked, by *Mr. Cook*, must be answered.

The witness then stated that *Lester* had been in possession of all the land conveyed to him by *Altizer*, including the land in controversy ever since about 1817—that he was so in possession in 1834 and 1848—that there had been an old house on the land in controversy but by whom built the witness did not know: that *Lester* had occasionally cultivated and pastured a part of the land in controversy, as witness believed; but that, not knowing exactly where the lines were, he could not speak with precision; and that *Lester* had always claimed the land in controversy as part of that conveyed to him by *Altizer*, within the lines of whose deed it was included.

The defendant introduced parol evidence, tending to shew that the land in controversy was within the lines of the grant to *Bishop*; and also that *Lester* was in actual possession of the land in controversy; but the evidence left some doubt as to both those questions; a doubt which could only be settled by the jury. Among other evidence the defendant offered to read the deposition of *Jacob Bishop*, a brother of the patentee *George Bishop*, in which it was stated that *George Bishop* had built the old house on the land in controversy. *Staples* objected

to this deposition, until it should be made to appear that the deponent was unable to attend the trial. The defendant introduced two persons who said they were well acquainted with *Jacob Bishop*; that he was between ninety and a hundred years old; that he lived in the edge of Montgomery County, about twelve miles from Jacksonville; that he was quite infirm, and they did not believe him able to reach Jacksonville without help, or by any ordinary means of conveyance; but they had not seen him for a week, and did not know his condition on the day of trial. The plaintiff introduced two persons, one of whom said that *Bishop* was able to go to mill on horseback, for he had done so several times during the past winter, and the witness had seen him at mill about two weeks before the trial; and he had to go some three miles to the mill. The other swore that on Monday the 5th of April he saw and conversed with *Jacob Bishop* at Christiansburg—twelve miles from his residence, and he was in ordinary health. The trial took place on the 7th of April.

FULTON J.

According to a decision of the District Court at Abingdon, made last winter in a case of *Sexton vs. Crockett*, it is not necessary to shew that the witness is unable to attend, *at the time of the trial*; it is sufficient if it appear that he *has been* so unable; and the *onus* is then shifted upon the other party of shewing that the disability no longer exists. Now then the defendant certainly made a *prima facie* case, authorizing this deposition to be read. His witness is nearly a hundred years old: a fact of itself almost enough to lead me to infer that he is not able to attend; and two of his acquaintances say that they do not believe him able to travel. But it seems that they are mistaken, for it is stated that this old gentleman was, only two days ago, at a place just the same distance from his house as this village. Now if he could be at Christiansburg on Monday, I would not be justified, without further information, in holding that he could not come to Jacksonville on Wednesday. The deposition cannot be read.

No evidence was given tending to shew that *Austin Nicholls* or any one claiming under him ever took possession of any part of his land, until *J. Otey* went upon it in 1834.

When the evidence was finished, *Cook* moved certain instructions to the jury. Some verbal instructions were suggested by the court, to obviate certain objections made by the plaintiff's counsel; and the instructions were finally presented in the following shape. (The authorities and the views of the counsel are indicated in the court's opinion.)

1st. The deed from the marshal, *H. Smith*, conveyed no title

to *John Belden*, unless it be proved that *Daniel Nicholls* was the heir at law of *Austin Nicholls*.

2nd. If the jury believe from the evidence that the land in controversy formed part of a larger tenement belonging to *James Lester*: that said *Lester* held possession of said larger tenement, claiming title thereto, for more than fifteen years prior to the institution of this suit, and transferred his rights, by deed, to the defendant, then such possession, by said *Lester*, of any part of said larger tenement, enured to invest him with the possession of the whole, to the extent of the boundaries claimed by him—in the absence of proof of adverse possession by the plaintiff or those under whom he claims, of some part of the land embraced in the patent under which he claims.

3d. That if the plaintiff, or those under whom he claims without having the legal title, took possession of any part of the land conveyed by *John Belden* to *J. Otey*, such possession did not oust the possession of any other person who was then in possession of another part, holding and claiming under an adverse title; and if the defendant or those under whom he claims, was in possession of the land in controversy, then such possession so taken by the plaintiff and those under whom he claims of another part of the land conveyed by *Belden*, did not affect the possession of the land in controversy by the defendant and those under whom he claims.

FULTON J.

These instructions, as I am now asked to give them, are in the form of a series, connected together, and of which the two latter depend, at least to some extent, upon what precedes them. This must be borne in mind to prevent any misconception of their force and effect.

As to the first I am relieved from all doubt or difficulty. We frequently have authorities, derived from cases decided upon facts analogous to those at bar. It is not often that we are favoured with a decision on the very facts, involved in a pending litigation. Such, however, is the case in the present instance. The precise question involved in this first instruction, has been decided by the court of appeals in the case of *Duncan v. Helms*, 8 Grat. 68. The demandants in that case offered this very deed, decree and record in evidence, as the foundation of their title; and the court of appeals reversing the decision of my predecessor Judge *Taliaferro*, decided that as against the tenant, that deed and decree were not even *prima facie* evidence of the facts, recited in the deed and alleged in the bill—to-wit: that *Daniel Nicholls* was the heir at law of *Austin Nicholls*, and that the title of *Austin Nicholls* had been transferred to *Belden* the

plaintiff in the bill, and grantee in the marshal's deed. Now I have only to repeat that decision; and to say that as the plaintiff has adduced *no evidence at all* of those facts, *de hors* that record and deed, he stands here without the legal title to this land.

This opinion reduces this case to a question of possession between these parties. As a *color of title* the deed to *Belden* may operate to strengthen any possession which may have been taken under it; and so confer upon the claimant under it a sufficient right, derived from such possession. This proposition has been affirmed by the court of appeals in *Flanagan vs. Grimanet*, 10 Grat. 421, (see page 441) to say nothing of other authorities.

There are also some unquestioned facts in this case which are not without importance, and to which, as they are uncontradicted, it is not improper for me to refer. It is admitted that the *whole* of the *George Bishop's* patent lies inside of the *Nicholls* grant, and also within the lines of *Belden's* deed to *Sowers*, under which the plaintiff claims. I do not think, therefore, that this case presents the question of "*interlock*," so warmly contested in the many cases running from *Taylor vs. Burnside* in 1 Grat. to *Koiner vs. Rankin* in 11 Grat. As between the immediate parties to this suit there is an alleged interlock; but between this defendant and those under whom he claims, and the *Nicholls* patent and *Belden's* deed for the 600 acres, there is no such question; and it is against those documents, and the claim derived from them, that the defendant's rights are to be tested. It is further conceded that there never was any actual *seizin* on the part of *Austin Nicholls*, or any person claiming under him, of any part of the land embraced in this patent, prior to *Belden's* conveyance of the 600 acres, part thereof in 1834.

So far as the second instruction is concerned, I have substantially expressed my opinion, on a preliminary question. That instruction propounds, in connection with the facts supposed or admitted, of this case, the general proposition that "possession of part is possession of the whole, when no actual adverse possession is proved." I have already intimated that I consider this to be the law. One or two considerations, however, are supposed to militate against this position. The first is that this doctrine is not allowed to prevail as against the elder patentee; that when there is an *interlock* between an older and a younger patent, the junior patentee, to sustain the defence of *adversary* possession, must shew that he took and held actual possession of the land *in the interlock*, or some part thereof; and that if he merely take possession of his own land, outside of the interlock, his possession will not extend to, nor embrace the interlock;

no; invest the senior patentee's constructive *seizin* of the interlock; and *Rankin vs. Koiner* in 11 Grat. and *Anderson vs. Carvey* in 10 Grat. have at length decided that question. But I do not think those cases control this: they are neither adapted to the facts, admitted or alledged, nor to the theory of the instruction. That instruction does not look to the question of interlock at all, it treats the tenement, held by force of the *Bishop* patent, as a whole: and goes upon the concession that the whole is covered by the *Nicholls* grant; and that, as against that grant, there is no difference between the lesser tenement, carved out of the *Bishop* grant, (if indeed it ever was a part of that grant, which as a disputed matter of fact it is not for me to settle,) and now held by the defendant, and the residue of the land embraced in the *Bishop* patent. Such, I repeat, is the theory of the instruction, and if that theory be sustained by the evidence, of which the jury is to judge, then no decision as to the interlock can operate upon the case. It must not be forgotten that here the plaintiff does not hold the legal title: that title, so far as this case is concerned, is yet outstanding in *Austin Nicholls* or his heirs; as against them, there is no question of part possession. If the possession of the defendant, and them under whom he claims, is good to any part it is good for all; if it fails as to part, it fails as to all.

In regard to the statutory provision on this subject found in the 19th section of chap. 135, page 560 of the Code, it may admit of very grave question whether the Legislature did not intend, by the use of the word "actual" to alter the doctrine relative to *constructive seizin*. The elder patentee is said to have *constructive seizin*—possession in law—and that can only be defeated by the actual entry of a junior patentee. Our courts have held that this constructive possession is sufficient to limit the operation of the rule that possession of part is possession of the whole: the legislature has said, in substance, that *actual* possession is necessary to work such limitation: may not the effect of this provision be to enable the junior patentee, in a case of interlock, to oust the senior patentee, who is not in *actual* possession of the land. I, however, do not think such a question arises in this case; nor can I say how it might have to be decided if raised. It is sufficient for me to say that I think the second instruction asked for is correct; and that in this case, at least, possession of part is possession of the whole. See opinion of MONCURE J. in *Olinger vs. Shephard*, 12 Grat. at page 473.

It is not necessary to add much to what has been said, when we come to consider the third instruction. It is in effect the converse of the second. It rests upon the supposition that the

plaintiff has not the legal title. How the question might be affected if the plaintiff could shew himself the holder of the legal title it is not necessary to decide. If *Austin Nicholls* or his heir or grantee were plaintiff, there is little doubt that his entry, (if made in time) would oust the defendant from all land not in his actual possession. But that is not the case. The defendant is contending with a claimant whom I have already decided to be without the legal title; and he only asks me to say to the jury that the entry of such claimant, without legal title, does not extend beyond the limits of his actual possession, and does not affect the *seizin* of another person, who is in possession under an adverse claim. I think I am obliged to give that instruction. Even if the holder of the legal title had made the entry it is extremely doubtful, to say the least, whether it would prevail over the *actual* possession of a holder previously seized by force of an adverse title. This is why I made the remarks I uttered as to the effect of the statute. But, as I said, there is no necessity to decide that question; but I think there can be little doubt as to the effect of such an entry made without the legal title. As I have held that possession of part is possession of the whole when there is no actual adverse possession, so I must hold, conversely, that possession of part is *not* possession of the whole when there is actual adverse possession; and so holding I must also give the third instruction.

No exception was taken to these instructions, and the jury found *for the defendant* judgment accordingly.

(After the decision of the foregoing case of *Otey vs. Cooper*, a gentleman of the bar, not connected with the case, intimated a doubt whether the authority of *Duncan vs. Helms* had not been shaken, at least, if not overthrown, by the decision in *Baylor's lessee vs. Dejarnette*, 13 Grat. 152. A friend, who was counsel in *Otey vs. Cooper*, was thereby induced to review the doctrine on the subject, and has favored us with the following remarks, which may be considered not unworthy the attention of the professional reader. ED. LAW JOURNAL.)

EFFECT OF DECREES AND JUDGMENTS IN EVIDENCE.

In the case of *Duncan vs. Helms*, 8 Grat. 68, the court of appeals decided that a deed, made under a decree in a suit in equity, is not, as against a stranger to the record, even *prima facie* evidence of the facts recited in the deed, or alleged in the bill, on which the decree was founded; and they reversed the

opinion of a circuit court, which instructed the jury that such deed was *prima facie* evidence of the facts therein recited. The importance of the principle, and the frequency of the cases in which it is applied, will justify an enquiry into the foundation upon which it rests, and the question as to whether it has been impugned by any subsequent decision.

As a question of principle, aside from any authorities, it would seem that the doctrine of the case is sound and safe. Any other rule would open the door to great fraud and abuse. Any unprincipled schemer would only have to manufacture a case, which he knew that no person would take the trouble to defend, and running it through a court of equity, as is so often done, almost *sub silentio*, would come forth with a deed, which upon its face would purport to give him title to property, and force other parties into a hopeless and expensive search for evidence to rebut a vamped up claim, sustained only by the allegations, made in a bill, taken *pro confesso*. The case of *Duncan vs. Helms* affords an excellent illustration. An immense tract of land, then of little value, but now become very desirable, was, at an early day, granted to one *Nicholls*. Thirty-odd years subsequent to the patent, a land speculator exhibits his bill, alleging that the patentee is dead—that his equitable title has devolved upon the plaintiff: that the legal title descended to the patentee's brother, who was his sole heir at law: that that brother is an inhabitant of New England, and plaintiff prays a conveyance of the legal title. An order of publication is duly made—the bill is taken for confessed, without a particle of proof of a single allegation—the bill not being even verified by affidavit, and a conveyance is decreed and executed. If such a title could be sustained, against a stranger to the suit, there is no limit to the extent to which fraud might be practised. Our court refused to sustain the claim, and required proof, *de hors* the records, of the facts alleged in the bill.

Was this opinion justified by the English and American authorities, not including our own supreme court? Starkie, vol. 1, page 287, lays it down, that a bill in equity is not admissible, as it seems in any case, except against the plaintiff himself or those who claim through him, as to any facts alleged in the bill;” and he cites the celebrated Banbury Peerage case in support of the doctrine. In that case the Judges in answer to a question of the House of Lords, say that, “generally speaking, a bill in chancery cannot be received as evidence in a court of law, to prove any facts either alleged or denied in such bill.” Gresley in his *Equity Evidence*, page 422, says, on the authority of *Brown's Parliamentary cases*, vol. 3, page 595; “a decree in the court of chancery, determining a matter of right, is good

evidence of that right as to all persons claiming under the party against whom the decree was made." At page 427 he adds, "as for pleadings in equity a bill is evidence of nothing whatever, except the bare fact of such a bill having been filed." "Still less will it be received to prove the truth of its own allegations or denials." He cites the case of *Bowerman vs. Lybourne*, 7 Term. Rep. 2, in which the court of King's Bench went the great length of holding that a bill in equity was not even evidence against the plaintiff himself, because it is only the suggestion of counsel."

Phillipps on Evidence, vol. 1, page 358, says, "a decree in the court of chancery may be given in evidence on the same footing and under the same limitations, as the verdict or judgment of a court of common law:"—and in reference to the latter he says, at page 326 of the same volume, that "the general rule is, that a verdict cannot be evidence for either party, in an action against one who was a *stranger* to the former proceeding." He adds, "it is laid down, also, as a general rule that a verdict is not evidence for a *stranger*, against one who was a party to the former suit," because the benefit or burden must be *mutual*.

Greenleaf adopts the like doctrine, saying at sec. 522 that, "it is a most obvious principle of justice that no man ought to be bound by proceedings to which he is a stranger, but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound." In section 551, he also says that, "pleadings and depositions are a decree, in a former suit, the same title being in issue, are admissible as showing the acts of parties, who had the same interest in it as the present party, against whom they are offered."

When we come to examine the Virginia authorities, we find that the case of *Duncan vs. Helms* does not stand alone. The principle therein announced has been adopted, to a greater or less extent, in several other cases. In *Paynes vs. Coles* 1 Munf., 373 it is laid down that, "a record of one suit cannot be read as evidence in another, unless both the parties or those under whom they claim, were parties to both suits;" and this was the unanimous opinion of the court as we are told by Judge FLEMING at page 397.

Chapman vs. Chapman 1 Munford 398, lays down the same doctrine. In that case Judge TUCKER, with the concurrence of the rest of the court, states that "the general rule as to giving verdicts and judgments in evidence is that they are not to be admitted but between parties or privies;" and the court, in accordance with that rule, held that "a record of one suit cannot be read as evidence in another, on the ground that the de-

fendant and one of the plaintiffs in the latter suit were parties to the former, and that the same point was in controversy in both; *another plaintiff* and the person under whom both the plaintiffs *jointly* claim, not having been parties to such former suit."

Lowell vs. Arnold 2 Munf. is a case still more strongly sustaining this doctrine. It is nearly identical with *Duncan vs. Helms*. There, in a suit in chancery, it was alleged that A. R. was son and heir of P. R: and upon that allegation a decree was pronounced and a conveyance executed. The court held that the record was not evidence of the heirship; their opinion being expressed to this effect: "In tracing a title to land in controversy, a decree in a suit *between other parties* is not evidence against a person *claiming under neither of them*, that one of those parties was, in fact, as therein described, eldest son and heir of a former proprietor; it being incumbent upon the party, wishing to avail himself of such fact, to prove it by evidence *aliunde*; but such decree may be received (as a link in our chain of evidence) to prove the fact that it was rendered."

In *Downer & Co. vs. Morrison*, 2 Grat. 250, the general principle of the inadmissibility of a record except as against parties and privies, is again laid down, though there is nothing to be found therein strictly applicable to the *effect* of recitals of fact contained in the record.

Nor is *Duncan vs. Helms* the last case in which the court of appeals has held this doctrine. It is clearly laid down in *Early vs. Garland*, 13 Grat. 1. The plaintiff in that cause sought to conclude the defendants by the record of a suit in which a person under whom the defendant claimed, had been a party, the object sought being to shew that said party was unsuccessful.

LEE J. in delivering the opinion of the majority of the court says, at page 12, "It (the decree) was evidence and conclusive of the fact that such a decree had been rendered, but it was not conclusive as against the heirs of *Dr. Cabell*, who were no parties, and whose ancestor the record itself shewed was dead at the time it was pronounced, that that ancestor was such a (*pendente lite*) purchaser." He immediately adds, "As to those who are no parties, though it is always evidence to prove that such judgment or decree was rendered, yet it is not so as a medium of proof of ulterior facts upon which it was founded, or which may be recited in the record."

It is not to be presumed that the court would lightly depart from such a train of decisions, or even do anything to shake their authority; nor is it thought that anything, having such an effect, is to be found in *Baylor vs. Dejarnette*, 13 Grat. 152. Three of the judges (ALLEN, DANIEL and MONCURE) by whom

Duncan vs. Helms was decided, concurred in *Baylor vs. Dejar-nette* ; and Judge LEE delivered the opinion in the latter case as well as in *Early vs. Garland*. It can hardly be supposed, then, that they had so quickly changed their opinions. And a broad distinction is accordingly formed between *Baylor vs. De-jarnette*, and all the other cases before mentioned. It is that the court considered the plaintiff, *Baylor* (as against whom the former decree was sought to be used) as being in effect a party to the cause in which that decree was pronounced. It is true that he was not *nominally* a party to that suit. But he was a contingent remainderman. His father was a party to the suit ; and was tenant for life, with a contingent remainder to his eldest son, which eldest son the plaintiff was ; and the contingent remainder had vested in the plaintiff, on the death of his father *after* the decree, sale and conveyance of the land. The court adopted the doctrine of *equitable representation* ; and held the remainderman to be bound by the decree against the land, while in the hands of the tenant for life. This was nothing more than an application of the rule that decrees and judgments bind not only the parties but their *privies* ; just as, recurring to the case of *Duncan vs. Helms*, it would doubtless be held that *Daniel Nicholls* and his heirs would be bound by *Belden's* decree against him. The court did not, in *Baylor vs. Dejar-nette*, intimate any intention to overrule *Duncan vs. Helms* and the like cases ; for none of them are even mentioned ; and it is thought that the rule they establish is in full force ; and that to prove any fact recited in a record, as against a stranger thereto, that record itself is insufficient, and resort must be had to extrinsic testimony.

GAMING.

Commonwealth v. Kennedy.

Circuit Court of Floyd Co. Va., April Term, 1858.

An indictment for "playing at faro" is good, and it is not necessary to use the word *table* or *bank* in describing the offence.

A member of a grand jury had made a contract for the purchase of a mill, before he served on the grand inquest ; but nothing had been done under the contract ; and by its terms the purchaser was not entitled to possession until a period after his service took place : he is not disqualified, and is a competent grand juror.

Kennedy, with a number of others, was indicted at April

term, 1857, for unlawful gaming. He appeared at this term and moved the court to quash the indictment, because it did not state any offence. The language of the indictment was, that the defendant "did play at faro." The defendant contended that the charge should have been, that "he did play at a faro bank" or "faro table," and referred to the 1st and 4th sections of chap. 198 of the Code.

Banks, Com. Atto.

Staples, for the defendant.

FULTON, J.

It is true that in describing a statutory offence, the safest rule is to adhere to the language of the statute. A literal adherence, however, is not necessary; it is sufficient if there be a substantial compliance with the requisites of the statute. Now, a man cannot play at faro, without playing at a faro bank or table. I think that the object of the statute was to suppress the game; and when the party is charged with playing at a particular game, the court must infer that the charge embraces all the incidents of the game. I must overrule the motion to quash.

The defendant then filed a plea in abatement, stating "that *Harvey Dewees*, who was a member of the grand jury by which the said indictment was found, was, at the time the same was found, the owner of a water grist mill in Floyd county." To this plea the Commonwealth's Attorney replied generally.

A jury was dispensed with, and the facts were ascertained by the court, and appeared to be as follows: On the 16th March, 1857, *Andrew Dewees* sold to *Harvey Dewees* (the grand juror) one half of a water grist mill and fifteen acres of land thereto attached, in Floyd county. The contract of sale was in writing, under the hands and seals of the contracting parties. By its terms the purchaser was to have possession in one month from the date of the agreement; and was to pay the purchase money one half in six and the other half in twelve months. *Harvey Dewees* was summoned and served as a grand juror on the first Monday in April, 1857, and this indictment was found on that day. At that time he had paid no part of the purchase money, and had not taken possession of the property,—nor had the time arrived when he was to have the possession. Nothing had been done towards carrying the contract into execution. Said *Dewees* owned other lands, and was a competent grand juror, unless disqualified by this contract of purchase.

FULTON, J.

The facts of this case were settled on yesterday, and I took time till this morning to consider whether they support the plea. In so doing I have examined the several cases decided by the General Court, relative to the competency of grand jurors who have not the legal title to their lands. It is true that the question here is not whether Mr. *Deweese* is a freeholder in the eye of the law: he has a freehold estate in other lands than the mill tenement, so that no question of that kind arises. But the question here is, whether, being a freeholder, he is nevertheless disqualified to act as a grand juror. Now, in the view I have taken of this case, it presents a question which is precisely the *converse* of that presented in *Moore's case*, 9 Leigh 639, and other cases referred to in the argument. If Mr. *Deweese* had no other land than the tenement on which this mill stands, and had no other right than what arises under this contract, would this contract and the other established facts show him to be a good grand juror? If it would not thus appear that he is qualified, would such a contract and such facts suffice to disqualify him, if otherwise competent?

I am bound by those decisions of higher courts which have held that the equitable owner of lands, who is in a condition to claim and enforce a conveyance of the legal title, is a *freeholder* in the sense intended by our statutes, and therefore a competent grand juror. If not so bound I would not hold such a doctrine—for I think that our statute originally contemplated only the owner of a legal estate of freehold as a competent grand juror, and I am not disposed to extend the doctrine of equitable competency further than it has been carried. And I do not think that any case goes the length of holding that such a contract as this would render the purchaser a competent freeholder, in virtue of his equitable right. He did not obtain possession at the time of the contract, and was not to have possession until some two weeks after he served on the grand inquest. He had paid no part of the purchase money, and was not to pay any for a considerable period; and by the very terms of the agreement, no conveyance was to be made till the purchase money should have been paid. Now, no case that I have seen would justify me in holding that such a purchaser is an equitable freeholder. No court of equity would decree a conveyance of the legal title under such circumstances. The purchaser was in no condition to claim or enforce such a conveyance. I therefore feel satisfied that the facts proved would not make Mr. *Deweese* a good grand juror, if he had no other land; and so thinking I must hold the converse result that, being otherwise competent, these facts do not disqualify him.

The reason why an owner of a mill is not allowed to serve as a grand juror, is, that he is liable to peculiar penalties; and it is, therefore, deemed improper to make him a member of the presenting body. But nothing of this sort is applicable to a man in the situation of Mr. *Deweese*. He did not occupy this mill; he was not liable for its management; no proceedings could be taken against him in connection with it. The time had not come at which such liabilities could attach to him. As yet his vendor was the responsible party. *Reynold's case*, 4 Leigh. 663, shews that *Andrew Deweese* yet held the character of legal owner of this property. I must hold *Harvey Deweese* a competent grand juror, and that the facts do not sustain the plea.

Judgment for the Commonwealth.

PARTNERSHIP—CO-PARTNER COMPETENT WITNESS.

Phillips vs. Headen's Committee.

Circuit Court of Floyd County, Va. April Term, 1858.

One member of a firm is sued for a partnership demand: a co-partner is a competent witness for the plaintiff.

Five persons constitute a partnership. The plaintiff agrees with one member to share in that member's portion of the profit and loss of the partnership adventure: this does not make the plaintiff a partner in the general concern, nor disable him from suing at law for a debt due him from the firm.

Dr. T. Headen, J. M. Patton, A. Cox, H. Phillips, and P. Phillips entered into a partnership in 1854, for the purpose of purchasing hogs and driving them to market in Eastern Virginia. They purchased large numbers of hogs, and lost heavily on the speculation. *Dr. Headen* became a lunatic, and a committee was appointed for him. *Tobias Phillips* brought an action of *assumpsit* against *Headen's* committee in the circuit court of Floyd, to recover certain sums of money alleged to be due him from the firm of *Headen* and others. The declaration recited the partnership—the lunacy of *Headen*—and the debts due to the plaintiff from the firm. No other member of the firm was made defendant in the action. The bill of particulars charged the price of thirty hogs, forty barrels of corn, and thirty days' work in driving hogs—amounting in the whole to nearly \$300. Plea, *non assumpsit*.

Staples for plaintiff.

Cook for defendant.

A jury was waived and the whole matter of law and fact submitted to the court. In opening the case the defendant's counsel said, that as one ground of defence, he expected to prove that the plaintiff himself was a member of the partnership.

The plaintiff examined several witnesses who proved his claims against the partnership. The defendant called a witness who said that "the plaintiff told him that he was equally interested in the hog speculation with *Henderson Phillips*" (one of the admitted partners,) "that if said *Henderson* made anything, he, the plaintiff, was to have half what he made, and if *Henderson* lost, then the plaintiff was to bear half the loss." To rebut this evidence, the plaintiff called *Henderson Phillips* himself.

Cook raised the question of the competency of the witness.

Staples urged that the interest of the witness was exactly equal even if it did not preponderate against the plaintiff. If the plaintiff waived the objection he could make this witness stand indifferent. If a judgment goes against his co-partner he is liable to contribute to its satisfaction. In fact there is no question at all when the plaintiff seeks to introduce him. The plaintiff makes him a witness at his own peril. His interest is all against the party seeking to introduce him. He referred to 1st Starkie 119 (side paging), and said that such a doctrine had been recognized by the Court of Appeals in the recent case of *Brown vs. Johnson* in 13 Grat.

FULTON, J.

I do not think that it lies in the defendant's mouth to object to the competency of his own partner as a witness. If the defendant was bringing forward this person, an objection from the plaintiff would exclude him. Of course he could not testify for his co-partner in a matter touching their joint interests. But the plaintiff waives that objection. The witness is called to testify against his own interest; if he does not object, and the plaintiff chooses to run the risk, I must hear him.

Henderson Phillips then stated that after the partnership was formed, and after nearly all their hogs had been bought, he and the plaintiff entered into an agreement whereby the plaintiff was to take half the risk of *Henderson Phillips'* interest in the enterprise. If the adventure proved successful, *Henderson Phillips* was to give the plaintiff one-half of his (Henderson's) share of the profits; if it turned out badly, the plaintiff was to pay one-half of *Henderson's part* of the loss. The other partners had nothing to do with this agreement, and

did not even know of it. It was a mere private contract between the two.

Cook contended that this agreement made the plaintiff a partner with all the members of the firm. The only sound criterion and test of partnership is "communion of profit and loss." That existed here, and the plaintiff ought therefore to be non-suited. He cited *Collyer* on Part. §§ 10 and 18.

Staples combatted this view, and insisted that a mere private agreement between one partner and another person to divide that partner's *share* of the profit did not create any general liability to losses, or give a valid general claim to profits. The individual partner's interest is his own property, with which he may deal as he pleases. He may assign his portion to whom he chooses. and may make any arrangements he can to protect himself from loss. He referred to the 8th sec. of *Collyer*, and particularly to *Raymond's* case therein mentioned.

FULTON, J.

It is not every agreement to share in profits and losses which will make the contracting party a partner. This is not always the case, even as against third persons; much less so in a question between the parties. It is not necessary to consider the case in any aspect it might assume in relation to third persons. But so far as the defendants are concerned I do not think any partnership is shown. This was merely an agreement between the plaintiff and a single partner, that the plaintiff should share equally with *that partner* in *his portion* of the profit or loss. This did not affect the general concern. So far from the other partners having any concern in this contract they were not even informed of its existence. They were not affected nor intended to be affected by it. They could neither promote nor forbid such an agreement. It gave the plaintiff no power nor control over the property and business of the firm; nor ought it to impose any burden on him, so far as relates to the firm itself. I think a partner has a clear right to assign the benefit of his interest in the concern to any one, provided he does not affect the rights of his co-partners by so doing. This was merely a sort of parol assignment; it was made subject to all the rights of the other members) and they have no right to complain of it. I do not think the plaintiff is a member of the firm; and as his claim is made out I must give him judgment.

Judgment for the plaintiff.

SET-OFF—JOINT DEMAND.

Evans Commissioner vs. Godbey.

Circuit Court of Floyd Co., Va.—April Term, 1858.

The general rule in equity, as well as at law, is that a joint demand cannot be set off against a separate debt.

On the ground of hopeless *insolvency* in the separate creditor, a court of equity will allow a set-off, which would be inadmissible at law.

G. is a member of a firm, to which E. is indebted at the time of his death; and G. owes E. a separate debt at the same time. The estate of E. is hopelessly insolvent. Equity will not allow the administrator of E. to collect the separate debt of G., but will set-off against it one half of the debt due from E. to the firm.

W. C. Hagán, administrator of *Dr. S. A. J. Evans*, brought an action of *assumpsit* in the Circuit Court of Floyd, against *Jackson Godbey*. The declaration was for work and labor done by *Dr. Evans*, as a physician, and for medicines furnished. Pleas, *non assumpsit*, payment and set-off. The parties entered into the following statement of facts and agreement.

It is admitted that at the time of the death of *Dr. Evans*, the defendant was indebted to him in the sum of \$156 15 cents, due upon account for medical services rendered to defendant's family. At the same time said Evans was indebted, on account, to the firm of *Deskins & Godbey*, (of which firm defendant was a member,) in the sum of \$305 47 cents. That the estate of said Evans is utterly insolvent: there being no means at all for the payment of the debt due to *Deskins & Godbey*; and if *Godbey* be compelled to pay his debt to the estate, he will lose the whole, as there are other claims which will swallow it up. Now the parties do make the following agreement. It being admitted that, *in this action*, no part of the debt due from *Evans* to *Deskins & Godbey*, could be allowed as a set-off to the defendant's debt to Evans; but the parties, wishing to avoid the costs and trouble of a suit in equity, and waiving the *legal question*, do agree that the court shall consider the facts hereinbefore agreed, as if they were set forth in a bill of injunction to a judgment in favor of the plaintiff, and that bill taken for confessed: and if upon those facts the defendant would be entitled, in equity, to set-off, against his debt to *Evans*, one half the debt of *Evans* to *Deskins & Godbey*, then he is in this action to be allowed such set-off: but if the court shall be of opinion that a court of equity would not allow any part of the debt, due to *Deskins & Godbey*, as a set-off against the defendant's liability,

then judgment is to be given in the plaintiff's favor, for his whole demand."

Lane for the plaintiff.

Cook for the defendant.

For the plaintiff it was contended that the rule is the same in equity as at law—that a joint demand cannot be set-off against a separate liability; and the following cases were cited. *Galliat v. Lynch*, 2d Leigh, 493. *Dale v. Cooke*, 4th Johnson, Ch. Cases 11.

For the defendant it was insisted that *insolvency* takes this case out of the operation of the general rule; the defendant relies and can only rely upon the insolvency. If *Evans'* estate was good, there would be no question. The rule laid down by Chancellor Kent in *Dale v. Cooke* and other like cases has never been attempted in Virginia; while the contrary doctrine has been repeatedly sanctioned. *Dunbar v. Buck*, 6 Munford, 34. *Ford v. Thornton*, 3d Leigh, 695. See Story's Equity, vol. 2d, Sections 14-37.

FULTON, J.

It is a general rule, well established, both at law and in equity, that a joint demand cannot be set-off against an individual liability. It is a rule founded alike in justice and convenience; but at the same time it ought not to be allowed, by its operation, to subvert justice. I do not consider it a rule of an inflexible character. The authorities, cited by the defendant's counsel, shew that the rule has sometimes been set aside for the purpose of working out a natural equity. Insolvency on the part of him who asserts the claim, against which the set-off is sought to be used, has been considered a sufficient ground for its admission.

The only question in this case is whether the facts would authorize a court of equity to take it out of the rule; and if ever there was one which would give such authority, I think that this is such a one. Our sense of justice revolts at the idea of compelling Mr. *Godbey* to pay a debt to an insolvent estate which owes hundreds of dollars to him and his partner, which they can never hope to recover. This may be *technical equity*, as it certainly is *strict law*; but it is not *real justice*. Still if the rule is obligatory he must submit, and sit down under the hardship; but I do not think it is inflexible. That, in general, equity has no right to interpose, is clear; but in the language of Judge Story, "Special circumstances may occur, creating an equity, which will justify such an interposition." In allowing the offset here, I go no further than did the Court of Appeals in *Ford v.*

Thornton, in 3d Leigh. I think justice requires this set-off to be made; and holding that I am not bound by the authorities to reject it, I shall give the plaintiff judgment for only \$3 37 cents, the balance; and each party must pay his own costs.

Judgment accordingly.

EVIDENCE—DECEASED WITNESS.

United States vs. Sterland.

District Court of the United States, Wytheville, Va.

In a prosecution against a postmaster, evidence having been given that the office *was suspected* on account of the disappearance of mail matter, which led to investigation, and ultimately to the prosecution, it is competent for the defendant to repel the presumption arising from this testimony, by shewing that miscarriages of the mails, sent through the same office, continued after his removal from the office.

The rule that the testimony of a deceased witness may be given in evidence on a second trial between the same parties, does not apply to a criminal cause. Such evidence is inadmissible to support either the prosecution or defence.

At October term, 1856, *James Sterland* was indicted for stealing a letter and its contents from the post office at *Wytheville, Va.*: he being a clerk employed in said office. He was put upon trial at that term, but the jury failed to agree. He was again tried, with the like result, at May term 1857; and now was put upon trial before a third jury, at this term.

F. B. Miller U. S. Attorney:

Floyd, Wysor & Cook for the prisoner.

It was proved that the prisoner was a clerk in the post office at Wytheville, and entrusted with the management of the mails at that place. A mail agent who was the principal witness for the prosecution, testified that in 1856, the post office at Wytheville had fallen under suspicion, owing to irregularities, and disappearances of mail matter, which seemed to be attributable to that office. He had therefore investigated the matter and his investigation had resulted in this prosecution.

After the case for the United States was closed, the prisoner called a witness, *James H. Myers*, and stated that his purpose

was to prove by this and other witnesses, that after the 29th day of October, 1856, (when the prisoner was arrested and imprisoned,) divers letters containing money and valuables, which had been mailed at Wytheville, had never reached their destination; and that he was in jail from October 1856, till the latter part of May 1857, when he was admitted to bail. Objection was made to the admission of this testimony, and counsel were heard on the question.

BROCKENBROUGH, J.

Evidence has been given that prior to the commencement of this prosecution, this post office had fallen under the suspicions of the department, in consequence of delinquencies in the transmission of the mails, for which this office was believed to be responsible; and that these suspicions were the motives leading to the action and investigation which terminated in this prosecution; and it is also shewn that the defendant was a clerk in this office, and of course exposed to these suspicions. This testimony was not necessary to support the prosecution: the facts might have been detailed without any statement of the suspicions which put the agents of government in motion. But that evidence is before the jury, and the prisoner is exposed to its influence against him. Whatever may be the weight of the testimony—be its effect much or little—he must suffer something from its operation. It therefore seems pertinent to rebut the effect of this evidence. To do this, the prisoner offers to shew that after he was arrested and imprisoned, and therefore relieved from all suspicion on account of subsequent delinquencies, there were still irregularities and miscarriages in this office. I think this is relevant and proper testimony. He is to be affected by evidence of delinquencies occurring while he was in the office: I think he ought to be allowed to shew that after his connection with the office had terminated, and he was in such a situation as to render it impossible to suspect him, the delinquencies continued to occur. I must admit the evidence for what it is worth.

In the further progress of the case, the prisoner proved that *Eli Rider* was examined as a witness in his behalf on the trial at May term 1857. and that *Rider* had since died. He then called a witness who said that he heard *Rider's* evidence, and could detail it; and the prisoner then proposed to offer *Rider's* statements in evidence. This was objected to on the ground that in a criminal trial, proof of the testimony given by a deceased witness on a former trial, is not admissible. For the general rule on the subject the prisoner's counsel referred to 1st Greenleaf on Evidence, sections 163 to 166; and to *Strutt vs.*

Bovingdon, 5th Espinasse's Rep., 56. On the other side *Finn vs. Commonwealth*, 5 Rand, 701 was relied on.

BROCKENBROUGH, J.

There is no question as to the rule that in a civil action either party may give in evidence the facts deposed to by a deceased person, who has testified upon a former trial. But I do not find that this course has ever been allowed in a criminal trial. On the other hand, *Finn's* case is a direct authority against the admission of such evidence.

It is true that in that case the testimony was offered *against* the prisoner, and the court held that it was the right of the accused to be confronted with his accuser and the witnesses. But if such evidence cannot be used against him, is it not a corollary from the decision that it may not be used in his favor? To me it seems that it is.

But the defendant's counsel contend that *Finn's* case is not binding upon this question, because upon the point now in dispute, that decision was a mere *obiter dictum*. It is true that in *Finn's* case the witness whose former testimony was offered against the prisoner was not dead; but he had left the Commonwealth—was beyond the jurisdiction of the court, and for all the practical purposes of the prosecution, was in the same condition as if dead. If it had been a civil action, proof of his statements on the former trial would have been admissible. The question, therefore, in that case was not precisely identical with the one at the bar; but the court considered the subject in both aspects, and decided that the absent witness could only be regarded as a dead man; or rather they decided that even if he were dead his statements would not be heard and still less could they be admitted on the ground of his absence from the jurisdiction.

I cannot say that I approve the rule as it is established. I can easily perceive the great oppression and hardship under which a man might suffer by reason of the death of his witness. It does seem that it is casting upon him an injury resulting from the act of God; and the remarks of Lord ELLENBOROUGH, in *Strutt vs. Bovingdon*, are very apposite, that this is not the loose asseveration of an irresponsible person, but his statement under the sanction of an oath, and it comes in that sacramental form in which alone is evidence to be heard. But I have no alternative, and am constrained to hold that this evidence is not admissible.

The prisoner was found *guilty* and sentenced to ten years imprisonment in the penitentiary of the United States.

PURCHASE MONEY—CONDITION PRECEDENT.

Crabtree v. Crabtree.

Circuit Court of Wythe County, Va. May Term, 1858.

The execution of a conveyance of land is not a condition precedent to the right to recover the purchase money.

The vendor of land dies without executing a conveyance, and his heirs have made none since his death. There is no defect in the title of the vendor. and no assertion of claim by any other person. The vendor's administrator may recover the purchase money.

James R. Crabtree's administrator brought an action of debt against *John Crabtree*, founded on a single bill for \$1500. The declaration was in the ordinary form.

Among other pleas, the defendant tendered a special one in writing, substantially as follows: "That in the lifetime of *Jas. R. Crabtree*, he and the defendant jointly purchased a tract of land from one *Spangler*: that *James R. Crabtree* sold his interest in this land to the defendant, at the price of \$1500—for which sum the single bill sued upon was executed—and for no other consideration: that after this transfer and sale, *Spangler* conveyed the land jointly to *James R. Crabtree* and defendant: that said *James* never conveyed to defendant the moiety of the land, and his heirs have not conveyed the same since his death, and that the legal title to the said moiety is still in said heirs; whereby the defendant says that the consideration of the said single bill has wholly failed, and he has sustained damage to the full amount thereof—wherefore," &c.

To the reception of this plea the plaintiff objected.

Cook for the plaintiff.

Sheffey & Leftwich for the defendant.

For the plaintiff it was submitted that the plea shewed no defence. There is no failure of consideration—for the plea does not allege that there is any defect in the title to the land—or that the defendant has been evicted; or that any person is setting up an adverse claim to the land. It does not even show that the vendor was requested to make a deed, or that his heirs have been called on to do so since his death. It is a mere attempt to do what has failed in countless instances—to delay the purchase money until a conveyance is made—in effect, to put the cart before the horse. The question is settled by the case of *Bailey v. Clay, &c.*, 4 Rand. 346. To the same effect are

the cases of *Beale v. Sieveley* 8 Leigh 658, and *Clarke v. Curtis*, 11 Leigh 559. If this plea be admitted, the defendant will hold the land, and yet avoid payment of its price. The statute of equitable set-off does not embrace this case; for a court of equity would grant no relief to the defendant, upon the case presented in the plea. A bill of injunction on such grounds would be open to a demurrer. And there is no standard or measure by which damages could be estimated, even if any damages at all could be allowed. At the most, the failure to convey the land would but be *damnum absque injuria*.

These views were contradicted by the defendant's counsel, who insisted that the case fell within the provisions of the 5th section of chap. 173, p. 654 of the Code, allowing set-offs of equitable matters. They contended that the failure to convey the land was such a failure of the consideration of the contract as would entitle the purchaser to relief against the obligation in part at least; and so would bring the case within the operation of the statute.

FULTON, J.

This plea is entirely inadmissible. It does not present any answer to the plaintiff's demand. By our law, as clearly established in the cases referred to, conveyance of land is not a condition precedent to the right of the vendor to demand his purchase money. Parties might, by an express contract, make the payments dependant upon the conveyance; but it is not alleged that it was so done in this case. It is true that courts of equity will not allow the vendor to collect his money when he *can* not or *will* not make a good title, or such as his contract requires; but this plea alleges nothing of the sort. There is no allegation of defect of title, or of refusal to execute a deed, or of eviction, or of outstanding title, in another person, or of any adverse claim. Nor is there any offer on the defendant's part to relinquish the land, and give up any right to apply to a court of equity for a conveyance. It is a bold effort to retain the land without paying for it.

There are two recent decisions of the Court of Appeals, which go pretty strongly to show that this plea would not be allowable even if it appeared that a title could not be made, or that steps had been taken, without effect, to obtain a conveyance. They are *Shiflett v. Orange Humane Society*, 7 Grat. 297, and *Watkins v. Hopkins*, 13 Grat. 743. But I need not dwell upon them, as the allegations of this plea do not raise the question.

If this matter presented any defence at all, it could only go to the whole demand. If the failure to make a deed affects the claim at all, it affects every part of it: it cannot have any par-

tial operation. If there be any measure of damages, it can be only the whole debt: there is no criterion whereby to assess a smaller allowance. But, as I have said, it is not allowed to affect the whole debt; and it follows that it can affect no part. The plea is rejected.

MR. HOWARD'S ARGUMENT IN BAILEY, &c. v. POINDEXTER'S
EXECUTOR.

In accordance with our promise, made in the last number of the Law Journal, we insert in our columns an abstract from the argument of Mr. John Howard, in the now leading case of *Bailey, &c. v. Poindexter's Ex'or.* It would have afforded us much pleasure to publish the whole argument, had our limited space permitted.

Since the publication of the opinion of the Supreme Court of Appeals in that case, it has been followed up by another decision of equal importance and value—*Williamson et. als. v. Coalter's Ex'ors et. als.* This case confirms the judgment in *Bailey, &c., v. Poindexter's Ex'or.*, that a slave has no power to elect to be free. The manumitting clause in this will was as follows:

"Fifth. I direct in regard to the balance of my negroes, that they shall be manumitted on the 1st day of January, 1858, and I authorize and request my executors to ascertain what fund will be sufficient to provide the usual outfit for and to remove said negroes to Liberia, and I hereby direct my said executors to raise said fund or such an amount, as in their judgment may be sufficient for that purpose, from my estate, and to use the said fund in removing and settling my said servants in Liberia, or any other free State or country, in which they may elect to live; the adults selecting for themselves and the parents for their infant children. And I further direct, that if any of my said servants shall prefer to remain in Virginia, instead of accepting the foregoing provisions, it is my desire that they shall be permitted by my executors, to select among my relatives their respective owners—said election to be made by the adults and parents as aforesaid." And property to the amount of from fifteen to twenty thousand dollars was charged as a fund for the use of the slaves.

Messrs. Patton & Howard argued the case against the emancipation and Messrs. Morson and Little in favor of it. The court decided that the will gave only a qualified emancipation to the slaves, which they had no legal capacity to accept and that therefore the will was void as to the conditional bequest of freedom. Thus it will be seen, that though not expressly so declared in the opinions of our courts, the old doctrine of the law, *in favorem libertatis* has been virtually abandoned and the policy of the law upon that subject has undergone a change, of which we have only seen the commencement.

African slavery as it exists in Virginia and the Southern States, is an institution *sui generis*. It is often compared to the Feudal Villenage and the Roman Servitude. It most resembles the last. But it is different from both. Commonwealth v. Turner, 5 Rand. 678. Neal v. Farmer, 9 Georgia R. 579. And no illustrations or analogies drawn from those sources can elucidate its legal character or relations.—*Ibid*. In discussing legal questions growing out of these relations, the remark of Tucker, J. in Elder v. Elder's ex'ors, 4 Leigh 252, may be generalized, and it may be said with perfect truth that there is an absence of all authority or analogy upon the subject, so far as any system of jurisprudence is concerned, except our own.

The legal character and nature of the slavery in this State must be decided therefore from positive law.

What law? The Constitutional and Statute Law.

For, whatever doubts may be entertained of the correctness of the decision, since the celebrated judgment of Lord Mansfield in Somersett's case, 20 Howell's State Trials, p. 1; Loft's R. 1; (1771);—it has been regarded as settled that slavery is unknown to the Common Law of England, and therefore unknown to that law as introduced into the colony, now the State of Virginia. And it was upon this ground that the General Court decided in Turner's case, 5 Rand. 678, that an indictment could not be sustained against a master for malicious, cruel and excessive beating of his own slave, there being no statute upon the subject.

In regard therefore to his civil rights and relations, the slave is that which the Constitutional and Statute law makes him. He is that in legal contemplation, and nothing more. He is absolutely unknown to the law in that respect, except in the *Ita lex scripta est*.

What then is the civil *status* of the slave, as shewn by the Constitutional and Statute law? I contend that by that law and from the necessary nature of slavery as it exists thereunder—*de natura legis et ex necessitate rei*—the slave has no civil rights and no legal capacity whatever.

Recognised rights on the part of the governed imply corresponding civil duties on the part of the government, for rights and duties are correlative terms. *Jus ei obligatio sunt correlata*.

If the slave has recognised civil rights, the State protects and is bound to protect those rights, and the obligation is to the slave. Recognised civil rights also imply civil remedies to enforce them, for without these, rights are nothing, and hence the universal maxim of the law that there is no legal right without a legal remedy. Civil remedies are the legal sanction and muniments of civil rights, their best criterion and only safeguard.

If the slave has civil rights, he must have civil remedies, which attach to him as a slave.

According to Blackstone, all civil rights may be reduced to three principal or primary articles; the right of personal liberty, the right of personal security, and the right of private property; because, as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or the other of these important rights, the preservation of these inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense. 1 Black. Com. 129, 130.

Now, which of these civil rights has the slave, that the State recognizes any obligation to the slave to enforce or does enforce? And what remedy has the slave, as such, to enforce it? Save the privilege given him by statute in the single and exceptional case of a suit for freedom, in what manner can a slave assert any legal right, plead or be impleaded? Has he *magna charta* or *habeas corpus*? Where are his Constitutional guarantees? To ask these questions is to answer them.

"In a state of slavery," says St. George Tucker, a strong friend of the slave, "the right of personal liberty and the right of private property are wholly abolished; the person of the slave being at the absolute disposal of his master; and property, what he is incapable, in that state, either of acquiring or holding to his own use." Tucker's Com. on Black., 2 vol. Appendix, p. 54. And as to personal security, the protection of life and limb given him by the law (for he cannot claim or command it as a right,) that but perpetuates his existence and market value in a state of slavery, a state of absolute nudation of all legal right and capacity.* Law, as to him, is only a compact between his rulers, to which he is utterly unknown.

* The General Court held in Souther's case, 7 Grat. 673, that though it is true, as decided in Turner's case, 5 Rand. 678, that an indictment will not lie against a master for the cruel, malicious and excessive beating of his own slave, since a right to dominion over the services and conduct of the slave necessarily implies and carries with it ample authority to enforce it, of the proper exercise of which the master, in the nature of things, must be the sole judge; yet that jurisdiction of life and death over the slave was not requisite for that purpose, and therefore, that if the master inflicted excessive and inhuman punishment upon his slave, he did it at the peril of his own responsibility to the criminal law, which forbids malicious homicide in any manner and by any body. That was a most righteous decision, though it may well be doubted whether the professed grounds of it are entirely consistent with the grounds of the decision in Turner's case, which was quoted and approved by the court. But surely, whether that be so or not, there is nothing in the case recognising any legal right in the slave to command personal security from

So far from having civil rights, he is but the object of the civil rights of others.

By the Constitution of the United States slaves are recognized as property, and though in arranging the apportionment of the ratio of direct taxation and of representation of the several States in Congress, slaves are embraced under the general designation of "three fifths of all other persons," yet their rights as persons are utterly ignored, and they are counted as such in that instrument merely in the adjustment of the ratio of taxation and of the rights of their owners and their owners's property to federal representation. *Dred Scott v. Sanford*, 19 Howard U. S. R. 414; 3 vol. Madison State Papers, tit. slaves. And that Congress has passed no law, and has no authority to pass any law, touching the rights and relations of Virginia masters in and to their slaves as property, except to recognize, protect and enforce these rights and relations as they exist under the State

the State. By a sort of customary law, from the introduction of slaves in Virginia to the present time, injuries to them of life and limb have been punished by whomsoever committed, and practically as much protection in that respect is furnished to the slave as to any other part of our population. For, as all their civil rights are transferred to their master as a necessary consequence and incident of slavery, the master is prompted by the suggestions at once of self-interest, pride and personal attachment to his slaves, not only to treat them humanely himself, but to protect them by the law, if need be, and sometimes without appealing to that slow and unsatisfactory process. But at the same time he acknowledges no legal right in the slave to compel him, or the law either, to vindicate his injuries. This view of the subject, I have been pleased to find confirmed by a recent judicial writer of great learning and philosophic accuracy of thought:

"Chattel slavery may exist under restrictions by municipal law on the power of the master, in view of the interests of society, without vesting the rights of a legal person in the Slave. Savigny: *Heut*, R. R., B. ii., c. 2 § 65. The person held in slavery may continue to have the character of property in the eye of the law, in States wherein, under the influence of public opinion or other moral causes, protection is in practice ensured to the slave as a natural person, unknown to other communities wherein the law upon which the relation rests is the same in judicial apprehension." *Topics of Jurisprudence connected with Conditions of Freedom and Bondage*, p. 42. By John C. Hurd, Counsellor at Law. New York: D. Van Nostrand, 1856. In illustration of the last remark of Mr. H. is the fact that it has been decided in Georgia that it is not felony at common law to kill a slave. 9 Georgia R. 579. In all of the Southern States, there are statutory regulations upon offences committed by or upon slaves, differing in detail, but all giving substantial protection to the slave of life and limb, without recognizing in him, so far as I have observed, the slightest legal right to compel such protection from the law, unless indeed the permitted exercise of the right of self-defence in certain extreme cases be regarded an acknowledgment of such.

Constitution and laws, need scarcely be stated to the supreme judiciary of Virginia, whose decisions have amply illustrated a noble fealty to the supremacy of State sovereignty in all matters within the sacred circle of its peculiar and exclusive jurisdiction.

By the Constitution of Virginia, slaves are expressly recognized as property, and not at all as persons having civil rights in any respect whatsoever. Art. IV., Sects. 22, 23.

And now looking to the statute law of the State, we find that from the earliest period, so far as their civil status is concerned, slaves are always spoken of and treated in the numerous acts of the House of Burgesses and the General Assembly, as mere property. It is a curious fact that there is no statute directly reducing negroes into slavery. "In 1620," says Captain Smith, "a Dutch ship of warre, brought us 20 *negars*," for sale; they were bought by the colonists; and that was the origin of African slavery in Virginia. They were first regarded as personal chattels, were bought and sold and held like any other personal estate, were subject to the payment of debts, and went to the executor or administrator, like any other personalty. Then, for a long time, in particular cases, such as descents, &c., they were made real estate, and passed to the heir at law. 3 Hen. Stat. Larg. 333, October, 1705; 4 Hen. Stat. Larg. 222, Feb. 1727; 2 Wash. 1, 7; *ibid* 68, 70; 2 H. & M. 69; 6 Munf. 200.

They continued to be such real estate during the whole period of the Revolution, and down to 1792, when by R. C. Chap. 103, it was enacted that "all negro and mulatto slaves, in all courts of judicature in this Commonwealth, shall be held, taken and adjudged to be personal estate." This was re-enacted by 1 R. C. p. 431, 1819; and by Code of Virginia, p. 458, 1849, it is summarily said: "Slaves shall be deemed personal estate."

Looking at these acts, it is safe to say that the law regards a negro slave, so far as his civil *status* is concerned, as purely and absolutely as mere property, to be bought and sold, and pass and descend, as a tract of land, a horse or an ox.

From this it necessarily follows, that the condition of the negro in slavery, is that of absolute civil incapacity, or rather of absolute civil non-entity. He is certainly incapable of owning property of any kind. He is incapable of making any legal contract by which property of any kind may be acquired or held. And he can do no civil legal act, by which the property of other persons can be lawfully divested, or alienated, or the relations of property be in any wise legally changed or affected. In regard to property, and the relations of property, he is emphatically and absolutely unknown to the law, except as the subject of property owned by another.

The Supreme Court of North Carolina, in a recent case, have well expressed the law, in the Southern States, upon this point: "Under our system of law, a slave can make no contract. In the nature of things he cannot. He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract; he has no legal mind. He is the property of his master. and all the proceeds of his labor belong to his owner. If property is devised or given to him, the devise or bequest is void, and the personalty given either belongs to the giver or becomes the property of the owner. A slave has no legal *status* in our courts, except as a criminal or as a witness in certain cases. In the Southern States the policy of our laws in keeping slaves within their proper sphere, has run through all the legislation of which their acts are the subject-matter." And the court then decided that "Contracts made by slaves are void, and if a slave executes his note or bond, and a free man is the security upon it, the note or bond is void, and the security not liable." *Butler v. Faulk*, Quarterly Law Journal for April 1857, p. 141.

In Virginia the statutes are numerous in which the legal incapacity of slaves to make contracts is clearly declared or implied, and the policy of keeping them in their "proper sphere" of absolute civil non-entity, distinctly enforced by various penalties inflicted upon all persons trading or dealing with them. October 1705, chap. 59, sec. 15, 3 Stat. Larg. 450; November 1753, chap. 7, 6 Stat. Larg. 359; 1785, 12 Stat. Larg. 183, 1792, chap. 103, R. C.; 1819, 1 R. C. chap. 111; 1849, Code of Va. p. 460.

And this, the Supreme Court of Appeals of Virginia has expressly decided that "A Court of Equity cannot enforce a promise made by a master that he will emancipate his slave, after a certain condition performed, which condition has been complied with." *Sawney vs. Carter*, 5 Rand. 173. In that case Judge Coalter, delivering the opinion of the whole court, strongly says: "The pauper in this case, claims his freedom on an alleged contract between his master and him, at the time he was purchased at an executor's sale, that on paying his purchase money, he should be free. He alleges that he has paid accordingly; but that his master would not emancipate him. * * * * * There is no case in this court, that I can find, justifying the idea that a Court of Equity can enforce such a contract; but the reverse has been decided, as will be seen hereafter.

In *Stevenson v. Singleton*, 1 Leigh, 72, the case of a contract between master and slave, whereby the master agreed to emancipate the slave for \$1,000, to be paid by the slave to him,

of which the slave paid \$566 ; Cabell, J., delivering the opinion of a full court, says : " In the case of *Sawney v. Carter*, 6 Rand. 178, this court refused, on great consideration, to enforce a promise by a master to emancipate his slave. It is impossible to distinguish that case from this. This court proceeded on the principle, that it is not competent to a court of chancery to enforce a contract between master and slave, even though the contract should be fully complied with on the part of the slave."

If legal rights be conceded the slave, the courts would be converted into a constant forum for settling the disputes between master and slave ; from which, as was well said Gholson, *arguendo* in *Adams v. Gilliam*, 1 Pat. & Heath, 161, would arise a state of things utterly incompatible with the proper subordination of the slave, nay with the existence of slavery in the community. Nor, indeed, from the relation between master and slave, can any contract, by or with a slave acting for himself. and in his own right, have any possible legal validity whatever. To constitute a good contract, the parties must be free agents ; but as the will of the master is the will of the slave, the necessary independence and freedom to make the contract, or not, does not exist. A still further and stronger reason is, that since the slave himself, and all the acquisitions of the slave, belong absolutely to the master, a contract by the master with his slave is but a contract by the master with his own property for his own property. It is no answer to say that the slave is competent to contract with the consent of his owner, with a third person ; because such person has no control over the slave, who, for the purpose of the contract, may be regarded as the agent of the master.

There have been similar decisions to the above in all the Southern States in which questions of this kind have been presented for adjudication.

That a promise or declaration made to a slave, or for his benefit, cannot be enforced in a court of law or equity ; that a slave cannot sue or be sued—(the exceptional case of a suit for freedom being provided for by statute or proceeding upon the legal fiction that he is free and is, therefore, entitled to relief from bondage)—that he cannot own or acquire property of any kind, in any way ; that he can make no valid contract of any sort—not even the contract of marriage ; that he has in fine, no civil rights whatever ; that all his civil rights of every character are transferred to his master ; that law as to him is only a compact between his rulers and the questions which concern him are matters between them ; See *Beall v. Joseph*, (a negro,) *Harden*, 51 : *The State v. Samuel*, 2 Dev. & Batt. 177 ; *Hall v. Dolly Mullen*, 5 Har. & John. 190 ; *Susan v. David Wells*, 3 Brevard, 11.

Bland and Norfolk v. Negro Dowling, Gist v. Tookey, 2 Rich. 424; State, use of Clements v. Van Lear et als., 5 Maryland Rep. 92; Sarah and Malinda v. Garaner et als., 24 Ala. 719; Smith v. State, 9 Ala. 990; Bynum v. Bostick, 4 Dess. 266; Cunningham v. Cunningham, Cam. & Nor. 353; Girod v. Lewis 6 Mart. La. Rep. 559; Brandon et als. v. Planters & Merchants Bank of Huntsville, 1 Stewart's Rep. 320; Lucy and Mark, 4 Mon. 167; Emerson v. Howland, 1 Mason's Rep. 45; Graves v. Allen, 13 B. Mon. R. 190; Lenoir v. Sylvester, 1 Bailey. 632; Ex Parte Boylston, 2 Stroth. 43; and that the Common Law is not applicable to the status of the slave, see State v. Boom. Taylor's Rep. 105, State v. Mann, 2 Dev. & Batt. Law Rep. 579-80; Fable v. Brown's ex'or, 2 Hill, 378; Neal v. Farmer, 9 Georgia Rep. 579-80; in which last case, after an elaborate argument by the bar, and great consideration by the court, it was held, in a judgment evincing much learning and ability, that the Law of Villenage had no application to African Slavery in England, or Georgia; that the Common Law of England is inapplicable to the institution of slavery, except to protect the rights of the master; that the civil rights of the master do not appertain to the slave; that the rights personal, if they might be so designated, of the slave, are some of them, essentially different from those of the master, and cannot therefore be subject to the same system of laws; that they must be defined by positive enactments, which, while they protect the slave, guard the rights of the master.

All these decisions are legal conclusions flowing naturally and necessarily from the one clear, simple, fundamental idea of chattel slavery. That fundamental idea is, that, in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing. The investiture of a chattel with civil rights or legal capacity, is a legal solecism and absurdity. The attribution of legal personality to a chattel slave—legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action, and corresponding legal obligations growing out of such qualities, faculties and action—implies a glaring contradiction in terms, an absolute legal impossibility; a hybrid legal status, a legal *lusus naturee*, which, in the very act of its abortive birth, destroys the source of its origin or is itself destroyed.

Chief Justice Taney, in delivering the judgment of the Supreme Court of the United States, in *Dred Scott v. Sanford*, states in the clearest manner the true light and condition in which the African race was esteemed and held at the time of the foundation of our State and Federal Governments, and thus

historically and philosophically accounts for the existing legal and political relations between the negro and the white man :

"They had, for more than a century before, been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations ; and so far inferior, that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the human race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed open to dispute ; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively employed in this commerce than any other nation in the world. The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought, and sold as such, in every one of the 13 colonies which united in the Declaration of Independence, and which afterwards formed the Constitution of the United States. The slaves were more or less numerous as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion at the time. The legislation of the colonies furnishes positive and indisputable proof of this fact." 19 Howard 407-8.

We have seen what strong and clear proof both the legislation and the courts of Virginia furnish of its truth.

An application of the foregoing principles and decisions ought, as it seems to me, to settle this case. * * * * *

In a bequest to slaves of a mere election between freedom and slavery, we have shown, in expounding this will, that there is no absolute, but only a conditional emancipation of the slaves ; that the act of election by them *to become free* is a necessary condition precedent to the accruing of their freedom ; and therefore, that on *their* will and pleasure, on *their* choice, or volition, is made to depend their future legal *status*.

The direct question to be decided then, is, Are slaves endowed with the civil capacity to choose between freedom and slavery? Can they emancipate themselves by their own volition? Can they divest the property of others in themselves by any legal act of their own?

Now it has been shown that the slave has no civil rights whatever. It has been shown that he has no civil status; that he can do no legal, civil act; that he has no legal mind, will or discretion; that he has absolutely no existence in the eye of the civil jurisdiction, except as a chattel, the subject of property, and the object of the civil rights of others. With what reason can it be contended that he has the civil right and the legal capacity to divest the property of others in himself; or to do that great, transcendent act of supreme, civil dignity, and sovereign power, the transformation of himself from a thing into a person, from a chattel to a man, clothed with all the high attributes of a citizen which can attach to his race? And if his master, endowed with all civil rights, and with plenary civil capacity, cannot emancipate him except by deed or will, executed in solemn form, can he emancipate himself by the simple expression of his pleasure to be free? Or, on the other hand, if the law requires that in order to enslave himself, if free, a negro must go through regular prescribed forms in a high Court of Justice, with all the safeguards of judicial protection around him, shall it be said that he can enslave himself forever, perchance by the mere light volition of a moment, the utterance of a word, or the nodding of his head? Where is the legal consistency in such anomalies and contradictions as these? How can they be reconciled with the established legal incapacity of the slave, or with either the spirit or the letter, or the purposes and policy of the emancipation laws?

But it is earnestly contended, that although it is true that slaves are chattels in Virginia, and are incapable as slaves of forming any legal contract, or doing other legal civil act, yet that they are not mere chattels, that they are human, sentient, moral and intellectual beings, that as such they are dealt with by the law; and therefore, that they ought to be held capable of an election between freedom and slavery. And in support of this view, one of the counsel for the appellees (Judge Crump) refers to *Summers and al. v. Bean*, 13 Grat. 412, in which there occurs this remark of Moncure, J., delivering the opinion of the Court: "Slaves are not only property, but rational beings; and are generally acquired with reference to their moral and intellectual qualities."

Now it is to be observed in this discussion, that the true

inquiry is, not what is the moral and intellectual character or capacity of the negro race, or for what qualities, or habits, slaves are generally acquired or esteemed, but what is the relation they sustain to the law of the land? And by reference to the case cited, it will be seen that the remark of the Judge, above quoted, had no allusion whatever to the civil relations or status of the slave, but on the contrary referred to his moral and intellectual qualities as affecting his peculiar value as an article of property. The question was, whether a Court of Equity will decree the specific execution of a contract for the sale or delivery of slaves at the suit of the purchaser, without any allegation or proof of peculiar value; and in dealing with this question, the Court looked to the character of the slave as an article of property, and to his moral and intellectual qualities as calculated to engender sentiments of friendship, affection, and esteem, on the part of the master, towards the slave, which might invest the slave with such special and peculiar value, in the eye of the master, as that adequate compensation for the loss of the slave could not be had at law in an action for damages. All the South Carolina decisions cited in the opinion of the Court, proceed upon the same ground. See particularly *Young v. Burton*, 1 McMul. Eq. R. 255. And they decide, as the Court of Appeals decided in this case, that a master may very well attach such a special and peculiar value to his slave on account of his personal qualities, as that no jury could give adequate compensation for his loss. The Court say: "Slaves are not only property, but rational beings; and are generally acquired with reference to their moral and intellectual qualities. Therefore damages at law, which are measured by the ordinary market value of the subject, will not generally afford adequate compensation for the breach of a contract for the sale of slaves. There is at least as much reason for enforcing the specific execution of such a contract as a contract for the sale of real estate. The only difference between the two cases seems to be this—that while in the latter specific execution will always be enforced if the contract be unobjectionable, and the suit be brought in due time, it will not in the former, if the slaves were purchased as merchandise, without reference to their peculiar value to the purchaser, or that the plaintiff is a mere mortgagee or other incumbrancer; in which case, as the slaves are to be sold at all events, damage at law assessed according to their market value, would be adequate compensation." The reasoning of the Court plainly shows that it regarded the slave merely as an article of property, to which his qualities or habits, or to

which peculiar circumstances might attach a special value, just as special value is attached to real estate from natural causes; and to argue thence that a negro slave was adjudged or recognized by that case to be endowed with the social and civil attributes of a white man, would be about as logical as to argue that real estate was adjudged or recognized to be endowed with the same attributes, because such is *its* character as property, and such the peculiar associations and feelings with which it is invested and regarded by mankind, that the law will enforce the specific execution of a contract for its purchase or sale.

Nor, as it seems to me, has the case of *Boyce v. Anderson*, 2 Peters, 150, referred to in this connection by the same counsel, any pertinency to this case. It is very true that Judge Marshall there said: "A slave has volition, and has feelings which cannot be entirely disregarded." But look at the case. It was an action of damages to recover the value of slaves lost by the negligence of the captain and commandants of a steamboat, as common carriers. The Supreme Court held that the law regulating the responsibility of common carriers, did not apply to the case, because the carrier has not, and could not have, the same control over slaves that he has over inanimate matter—that in the nature of things a slave resembled a passenger, and not a package of goods. The same might have been said of an apprentice, or other person bound to service. And the Chief Justice, in delivering the opinion of the Court, referred to the fact, that though there are no slaves in England, there are persons in whose service another has a temporary interest; but that the responsibility of a carrier, for injury which such person might sustain, has never been placed on the same principle with his responsibility for a bale of goods. But surely, in deciding that point, the English courts had no reference to the civil status of the persons so held to service: nor did the Supreme court in this case have any reference to the civil status of the slave. It considered the qualities, habits and character of the slave, as effecting his character as an article of transportation. "A slave," says the judge, "has volition, and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid this proceeding, but it might endanger his life or health. Consequently this rigorous mode of treatment cannot be adopted, unless stipulated for by contract. But left at liberty he may escape. The carrier has not and cannot have the same absolute control over him that he

has over a common package," &c. And therefore the carrier was not held to as high a degree of responsibility in the transportation of slaves, as in the transportation of a common package. The same principle, it is presumed, would apply, *sub modo*, to dogs, cattle, wild animals, &c., over which "the carrier has not and cannot have the same absolute control as over a common package." It might be good logic, but it would be bad law, to say that therefore dogs, horses, cattle and animals *feræ naturæ*, were recognized as something more, in legal contemplation, than mere property. It is alike bad logic and bad law, to say that, by this case, slaves are recognized as anything more. In the discussion of legal propositions, nothing is more dangerous than to adduce the incidental remarks, *dicta* or allusions of Judges, applicable enough, or excusable, in the cases in which they occur, to elucidate points of an utterly different character arising in an utterly different connection, and embracing relations and consequences to which the judges in the cases cited had no reference, and which they could not possibly, by any logical association of ideas have had in mind.

But the counsel has taken quite unnecessary trouble in citing these authorities to prove that slaves have intelligence, feelings, and volition. As late, indeed, as 1782, a doubt was publicly expressed in the British Parliament, as to whether an African negro has a soul. And many philosophic speculations have been indulged in regard to his claim to be considered of the same origin and genus as ourselves. But common observation teaches that our slaves, in some cases, have a very high degree of intellect and moral sense, and all of them have, in these latter times, a strong enough will of their own, which needs no invigoration or activity from a bestowal upon them of civil rights and legal capacity incompatible with their condition as slaves. The moral and intellectual qualities of our slaves, in fact, as in the case of Roman and all other slaves, enter largely into the elements of their value; it is because they have intelligence, a sense of right and wrong, and volition, that they are such useful instruments, as Aristotle calls them, in domestic and social life. And it is the pride and pleasure of many families in Virginia to cultivate the intellectual, moral, and religious faculties and feelings of their slaves to as high a degree as circumstances will admit. But all this has nothing to do with the question under consideration. The court is not sitting as an ethnological society, to ascertain and determine the peculiar, natural or acquired characteristics of the negro race; nor as a committee to investigate the elements and extent of the value of slaves. The inquiry is, what is the legal status of the slave under our laws?

Has he any legal volition, the exercise of which can change his legal condition, or affect the legal rights of the white race? If so, where is the statute which gives it? Where is the decision which defines its character and extent, or sanctions the legality, and prescribes the limits of its exercise? No statute can be found; and the absence of all authority is sufficiently illustrated by the citation of such cases as *Summers v. Bean*, and *Boyce v. Anderson*.

The learned counsel for the appellees might have drawn a much more plausible argument or illustration from a more direct and practical source. He might have said that the Criminal Code of Virginia recognizes slaves as responsible beings, and affixes penalties to the commission of crime by them; and that therefore the law of the land thus admits them to be endowed with intelligence, free will, and a moral sense—the same qualities or capacities which are requisite for rational choice between freedom and slavery. But even this will not bear examination. For, by recurring to the true issue, we see that the inquiry is, not as to whether a negro slave can commit a crime and will be punished for it, but what is his *civil status*. A married woman may commit a crime and will be punished for it, though she has no power to make a contract, and her civil being is absolutely merged in that of her husband. Her *civil* relations are very different things from the relation she sustains to the criminal law. The commission of a crime implies intelligence, free will, and a moral sense; but *these do not fix the civil status, or necessarily affect it in any manner*. Idiots, lunatics, and infants, of tender years, have all a fixed civil status, and fixed civil relations to property. They may inherit or be inherited from. They may be the objects of devises or bequests, though they cannot devise and bequeath. They may, and do, hold thousands of slaves, who, considered as natural persons, are endowed with some sort of intelligence, free will, and moral sense; yet the slaves, though thus endowed, cannot inherit or be inherited from, they cannot be the objects of devise or bequests, nor can they devise or bequeath, nor can they hold or acquire property in any manner of any kind. The civil status, therefore, is one thing; the criminal status is another and very different thing. The civil status has reference to property and all its relations; the power of holding it, using it, controlling it, acquiring it, and parting with it. The criminal status has reference to the moral relations between man and man. An individual may have a very high position in the one scale, and none at all in the other. An idiot may hold property, but is incapable of committing crime. A slave may commit crime, but is incapable of holding property. The two things are distinct and different, and have no necessary

legal or logical connection the one with the other. In ascertaining the criminal status or capacity of a party charged with crime no reference need be had to his civil abilities or disabilities. In ascertaining the civil status or capacity of a party who attempts to do a legal civil act, no reference need be had to his responsibilities at the bar of the criminal courts. We must, therefore, look to the civil jurisprudence for the civil status of the slave, and to the criminal jurisprudence for his criminal status. And in looking to the civil jurisprudence for the civil status of the slaves, we have seen that the slave, as such, has no civil capacity or existence whatever.

But it is contended for the slaves by Mr. Branch, Judge Crump, and I understand also by Mr. Patton, that the capacity of a slave to elect between freedom and slavery is *res adjudicata*, and citation is made to *Pleasants v. Pleasants*, 2 Call 270, and to *Elder v. Elder*, 4 Leigh, 252.

Now in regard to *Pleasants v. Pleasants*, it is sufficient to observe, that the direct question raised in this case does not appear either to have been mooted or suggested by the bar or to have been considered or at all alluded to by the court. Nor, indeed, was there any just reason why it should have been argued or considered. For by a particular examination of the will of John Pleasants, it appears that he clearly designed an absolute emancipation of his slaves, if the laws would permit it, and the bar and the bench so construed the will. For though in the first clause he says: "My further desire is, my poor slaves, all of them as I shall die possessed with, shall be free if they choose it when they arrive at 30 years, and the laws of the land will admit them to be free, without their being transported out of the country; yet in the following clause, in explanation of his meaning in the first, he distinctly says: "I say all my slaves now born or hereafter to be born, while their mothers are in the service of me or my heirs, to be free at the age of thirty years, to be adjudged of by my trustees their age." They were "to be free"—an absolute emancipation at the age of 30 years, if the laws would permit it. And such is Judge Green's interpretation of this will, when citing its provisions in a subsequent case. "By his will," says the Judge, he bequeathed his slaves to the members of his family, with direction that, as soon as it should be allowed by law, his slaves then (at the making of his will) born, or thereafter to be born, whilst their mothers should be in the service of the testator, or his heirs, should be free at the age of thirty years." *Maria and als. v. Surbaugh*, 2 Rand. 232. The will of Jonathan Pleasants still more distinctly emancipates his slaves: "And first believing that all mankind have an undoubted right to freedom, and commiserating the situation of the ne-

groes which by law I am invested with the property of, and being willing and desirous that they may in a good degree partake of and enjoy that inestimable blessing, do order and direct, as the most likely means to fit them for freedom, that they be instructed to read, at least the young ones as they become of suitable age, and that each individual of them that now are or may hereafter arrive to the age of 30 years may enjoy the full benefit of their color in a manner the most likely to answer the intention of relieving from bondage. And whenever the laws of the country will admit absolute freedom to them, it is my will and desire that all the slaves I am now possessed of, together with their increase, shall immediately on their coming to the age of 30 years as aforesaid, become free, or at least such as will accept thereof, or that my trustees hereafter to be named, or the successors of them may think so fitted for freedom, as that the enjoyment thereof may induce to their happiness, which I desire they may enjoy in as full and ample a manner as if they had never been in bondage," &c. Nothing can be clearer than that, conceding that a slave has no legal capacity to elect between freedom and slavery, those negroes were absolutely emancipated whenever they attained the age of 30 years, and the law would permit it. Now the whole court construed the two wills together as containing the same and identical provisions. Judge Roane says that it did not appear that Jonathan Pleasants had any slaves that he did not derive from his father, John Pleasants, and that Jonathan's will might therefore be thrown out of the case: "But if it were otherwise, I do not think it would make any material alteration in any estate or in the decision which ought now to be given," and so thought all the judges as their opinions and the decree entered, show. The negroes, therefore, being absolutely emancipated, no question need have arisen or did arise, or was argued or considered as to whether a slave, as such, is endowed with the civil capacity to emancipate himself by electing to take his freedom. The whole case thus shews that both court and counsel regarded the slaves as absolutely emancipated, upon the condition above mentioned. Nothing is said in the argument about the right of election; and no provision is made in the decree, giving the slaves an opportunity for an election—which certainly would have been done, if it had been considered that there was anything to be done by them to complete their emancipation. The decree proceeds upon the supposition that the slaves were absolutely emancipated when 30 years of age, and the laws would permit it, and decides that though if the testator "had devised them upon condition that the devisees should emancipate them immediately, the condition, being unlawful, would have been void, and the property vested;

yet, that the condition that they should become free when the law would permit it, was not." And it was decided that the devisees took the negroes with the trust that they should be emancipated, and decreed accordingly.

The truth is, the great question in that elaborately argued and considered case, turned upon the *doctrine of perpetuities, and executory limitations*, and not upon what is the civil *status* of the slave, or what constitutes or amounts to emancipation in a will. And that case decides nothing at all in reference to the main point in this.

So likewise in regard to *Elder v. Elder's ex'ors*, 4 Leigh 252. The question as to the civil capacity of a slave to emancipate himself, by electing to be free, was not suggested by counsel, nor considered by the court. There was a question raised as to the necessity of the choice being made within a given time, the space of 12 months; but no allusion is anywhere made in the case to the inquiry whether or not the slaves had any legal capacity to elect at all. So that the case of *Elder v. Elder* does not adjudicate the question in this court. It seems, indeed, to have been a point to which the attention of neither court nor counsel was directed—but passed over *sub silentio*, as indeed it well might, nay, certainly ought to have been, since by a consent decree in the court below, it had been tacitly waived and was not adjudicated, and therefore could not be reviewed in the appellate court; nor was the circumstance at all remarkable that such a question should not have been raised, considering the extravagant ideas afloat in the public mind just at that juncture (1833), in regard to the general subject of slavery and emancipation in Virginia, and the previous liberal leaning of the courts in the wrong direction of extending to the negro race the benefit, or injury rather, of those maxims *in favorem libertatis*, which in this country have a rightful application only to white men.

But even if the identical question now here for the first time distinctly and earnestly raised for adjudication, had been discussed by counsel, and considered by the court in that case, the opinions of the judges deciding it the one way or the other, would clearly have been *obiter dicta*. For the report of the case shows beyond all dispute that the question was not suggested by the pleadings; (See abstract of the bill and answer, p. 253,) and that by "consent of parties" in the court below—the trustee, executors and legatee or next of kin all being represented—it was referred by the chancellor to commissioners to ascertain the choice of the negroes; thus waving or ignoring the point now in dispute; by which it appears that in no shape or form was the question mooted by counsel or passed upon by the court below, and that, in fact, it could not rightfully have been passed upon,

as it was not suggested by the pleadings, and the decree was entered as a consent decree. And as the point was not passed upon by the court below, of course it could not be the subject of revision by the Court of Appeals. And, therefore, even if the Court of Appeals had considered the point and given the most elaborate opinions upon it, the one way or the other, the decision would have been clearly extra-judicial and of no binding effect upon subsequent cases in this court. But the Court of Appeals did not consider or decide the point at all, or consider or decide any thing in reference to the civil *status* or legal capacity of the slave. I know, indeed, that much stress is laid in the argument of all the counsel for the appellees upon certain expressions which fell from the Judges who sat in the case. But a careful analysis of the opinions delivered will show that they all proceed upon the concession of a legal capacity in the slave to make such an election, which was certainly proper in that case for the reasons above stated—the plaintiff claimed Mingo, indeed, upon the express ground that he had elected not to go to Liberia—and it will be further seen that the two main questions argued and decided were, first, whether sending the slaves to Liberia was a legal mode of emancipation, to which question the much relied upon expressions above alluded to wholly referred; (see especially the first clause of Judge Tucker's opinion, the first clause of Judge Cabell's, and first clause of Judge Carr's; and secondly, whether time was of the essence of the condition on which they should be sent to Liberia, that condition itself, *i. e.*, their choosing to go, being tacitly assumed as legal and valid, as above shown. *Elder v. Elder*, on this point, is the law of that case and none other.

The most, in any possible view, that can be contended for is, that the point was decided by implication, *sub silentio*, without argument or consideration; in which event it would not be binding authority even if decided by a full and unanimous court, and certainly not, if decided by a court, consisting as in this case, of only *three* judges. Great questions like this, affecting State policy not less than large private interests, ought never to be determined without thorough discussion and solemn and careful consideration; and it is not too much to ask or expect that this court—a full court of five judges—untrammelled by loose phrases or *obiter* intimations in supposed decisions upon points not argued and not under adjudication, will take into serious deliberation the novel, but highly important question now for the first time distinctly presented, upon full argument, for its authoritative judgment. And as *Pleasants v. Pleasants* and *Elder v. Elder*, are the only cases in which it is pretended allusion has been made the point by the Court of Appeals, we most respectfully, but

earnestly urge that the question is still a new question in this court—that so far from being *res adjudicata*, it is a question of the first impression here, upon which there are no *dicta* even, to cast a ray of light or shade of doubt.

The case of *Adams and als. v. Gilliam and als.*, 1 Patton and Heath's Rep. 101—Special Court of Appeals—presents the only approximation to the point, in the *quare*: "Whether a bequest to such person, as a slave may select for his master, would be valid?" upon which the court intimated no opinion.

The Supreme Court of Alabama, however, a sound, Southern, slave-holding State—and a Court justly entitled, by its learning and ability, to the high respect it receives from the appellate courts of the other States and from the profession generally, has decided the point in a direct and emphatic manner.

A testator by his will declared that certain of his slaves should be permitted to go to Africa, their passage to be paid, &c., but if they desired to remain subject to his daughter as they had been to him, they should be permitted to do so, but in no event to be sold, or deprived of this privilege, either before or after the death of his said daughter. Should they, or any, or all, prefer not to emigrate, then, and in that event, they should in all respects be subject to his daughter as they were to himself:

Held, that the slaves had not the legal capacity to choose between freedom and servitude, and that the bequest of freedom being void, the title to the slaves was vested in the daughter. *Carroll and wife v. Brumley's adm'r*, 13 Ala. R. 102; *Philip's Dig.* 254, S. C. And to the same effect, it is respectfully-urged, should be the decision of this Court in the cases now before it. Should the court hold that the slaves have no legal capacity to elect, it follows, as a matter of course, that they must remain in the state of slavery to which they belong, since the condition or event on which they were to take their freedom can never happen, and the bequest as to them is void. See *Taylor v. Cullin*, 12 Grat. 398, and the cases there cited.

Still another view of this will leads to the same conclusion. Supposing it legally possible for the slaves to make an election, until election is made they certainly are not free, but remain in a state of slavery, with the power at any time to leave it. In what sort of condition is that? It is not freedom, because the choice of freedom has not been made. It is not slavery, because that implies the right and power of coercion on the part of the master, while the moment that coercion is applied, the subject of it may defeat and defy the authority of its application by electing to be free. That is, the negroes may enjoy all the benefits and advantages of the condition of slavery without the necessity of compulsory labor, or the fear of salutary pun-

ishment for indolence or insubordination. And this state of things is to exist for an indefinite time, as no limit is prescribed in the will as the period of possible election. An intermediate and anomalous condition like this is fully covered by the rule, and the reason of the rule established in *Rucker's adm'r v. Gilbert*, 3 Leigh, 8; and *Wynn and als. v. Carroll and als.* 2 Grat. 227.

Suppose the slaves were to decline to make any election at all when called upon to do so, and should expressly or impliedly postpone making their election to another time. If they have an indefinite time allowed them by the will in which to make their election, no body has any right to compel them to elect before they desire to do so. A reasonable time, certainly, would be allowed them in which to make their election. But what would be a reasonable time? If a white man brought up in comfortable circumstances in Virginia, and with the certainty of being well provided for if he remained in the family, should be called upon to decide whether he would abandon his present happy position and try the chances of a doubtful future in a distant and unknown land, how long would he not hesitate before taking the irretrievable step? Ought he not to be allowed some time to look about him and inform himself of the facts in the case, and the prospects ahead on either side? Shall we say less of an ignorant slave, called upon to decide his own destiny and that of his posterity forever, and to cast it in the land of his birth or in a land far away from all the associations of his youth and manhood, but dimly apprehended in the clouded vision of his benighted mind?

And the time must vary according to the intelligence and age of the slaves and other circumstances which affect their capacity to make a rational and suitable election. Now, during all this time, are they in a condition of freedom or slavery? If hired out, upon what terms would the hirer take them? Subject to their election to leave him in the midst of the crop, just when they are wanted most? If slaves, no valid and binding contract could be made with them to serve during the year or until any given time, because slaves can make no contract. If free, that supposes their choice already made, while they claim and need time in which to make their choice.

Thus from day to day, from week to week, from month to month, perhaps from year to year, this anomalous state of things may exist in which the slave has no master and the master no slave; in which the slave enjoys all of liberty but its name, and bears all of servitude but compulsion; in which his children, if born before an election is made by their mother, are condemned to slavery, and he and their mother may become free by a simple

act of volition the next moment after the birth of their enslaved offspring. What sort of a condition is this if it be not a condition intermediate between that of freedom and slavery? Is it not of the very essence of that condition? If any time was fixed by the will at which the right of election should expire, that might in some measure alter the case, since until the election was made and the expiration of the time, the negroes would certainly continue *quasi* slaves, and at least a period would be fixed at which the anomalous condition would cease. Even this, however, would not in principle materially affect the case. But here the time is unlimited and the condition is to continue indefinitely, and all the evils growing out of a population half slave and half free, are brought forth and bred in a slaveholding community.

So extraordinary, inconsistent and dangerous a social *status* as this, is certainly embraced within the reason of the rule established in the cases above cited.

LATE ENGLISH DECISIONS.

FORGERY.—TRADE MARKS.—PRINTED WRAPPERS FOR POW- DERS.—SALE.

[CROWN CASES RESERVED.]

Saturday, April 24.

Reg. v. John Smith.

John Smith was tried before me at the Central Criminal Court upon an indictment charging him with forging certain documents, and with uttering them, knowing them to be forged.

It appeared that the prosecutor, George Borwick, was in the habit of selling certain powders, some called Borwick's baking powders, and others Borwick's egg powders.

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of George Borwick, but they were so wrapped that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavored to sell baking powders, but had them returned to him because they were not Borwick's powders. Subsequently he went to a printer, and

representing his name to be Borwick, desired him to print 10,000 labels as nearly as possible like those used by Borwick, except that the name of Borwick was to be omitted in the baking powders.

The labels were printed according to this order, and a considerable quantity of the prisoner's powders were subsequently sold by him as Borwick's powders wrapped in those labels.

On the part of the prisoner it was objected that the making or uttering such documents did not constitute the offence charged in the indictment. This point I determined to reserve for the consideration of the Court of Criminal Appeal, and I left it to the jury to find whether the labels so far resembled those used by Borwick as to deceive persons of ordinary observation, and to make them believe them to be Borwick's labels, and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them, directing them in that case to find the prisoner guilty.

The jury found him guilty.

The labels marked "genuine" sent herewith were those used by the prosecutor; and those marked "imitations" were the labels the subject of this prosecution, and reference can be made to them if necessary.

The prisoner has been admitted to bail to await the decision of the court for the consideration of Crown cases upon the foregoing facts.

RUSSELL GURNEY.

The genuine baking powder label commenced and ran thus:—"Patronized by the army and navy, Borwick's original German baking powder, &c. *The public is requested to see that each wrapper is signed George Borwick, without which none are genuine.* Wholesale by George Borwick, 24 and 25 London-wall," &c., &c. The genuine egg powder label commenced and ran thus:—"Borwick's Metropolitan egg powder of vegetable compound, being," &c., &c. It is sufficient, without setting out more, to state that in the printed paper made to imitate the first label the words in italics were omitted, and that in other respects it was precisely similar; and that the second label was imitated exactly without any alteration whatever.

The prisoner has been admitted to bail to wait the decision of the court for the consideration of Crown cases upon the foregoing points.

M'Intyre for the prisoner.—This is not a forgery either at common law or within the statute. The gist of the offence was the passing off for genuine baking powder that which was not so; in fact, something that was not so good. This was nothing more than a puff. In *Reg. v. Closs*, 27 L. J. 54, M.

C., it was held that a person could not be indicted for forging or uttering the forged name of a painter by falsely putting it on a spurious picture to pass it off as the genuine painting of the artist. This was no more than a printed label, and only differs from *Reg. v. Closs* in that there the name was printed on the picture. In the case of Burgess's sauce labels the Court of Ch. refused to restrain the son from using labels with the father's name upon them.

[POLLOCK, C. B.—Suppose a man opened a shop and painted it so as exactly to resemble his neighbor's, would that be forgery?]

No. The affixing this label to the powder amounts to no more than saying, "This is Borwick's powder." If the prisoner had had a license, he would have had a right to use the labels.

Huddleston (Poland with him) for the prosecution.—The definition of forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right," and the finding of the jury brings this case within that definition; (2 *Rus. on Crimes*, 318; 4 *Black. Com.* 247; *Stark. Crim. Law*, 468; 2 *East, P. C. c.* 19, s. 49, p. 965.)

[CHANNEL, B.—What was a document at common law which could be the subject of forgery? POLLOCK, C. B.—Was a book of which another man made copies?]

It is submitted that it was; (*Com. Dig.* "Forgery.") Letters may be the subject of forgery; (*Chit. Crim. Law*, 1022.) So a diploma of the College of Surgeons may be; (*Reg. v. Hodgson*, 7 *Cox Crim. Cas.* 122.) So also the certificate of the examiners of the Trinity House; (*Reg. v. Toshack*, 1 *Den. C. C.* 492.) So a letter of the character of a servant may be; (*Reg. v. Sharman*, 1 *Dears. C. C.* 285.) Then this label is a certificate as to the character of an article; (*Reg. v. Closs*; *R. v. Colicott*, *R. & R.* 201; *Stark. Crim. Law*, 479, were also cited.)

POLLOCK, C. B.—We are all of opinion that this conviction is bad. The defendant may have been guilty of obtaining money under false pretences; of that there can be no doubt; but the real offence here was, the issuing a false wrapper and enclosing false stuff within it. The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery; the real offence is the issuing them with the fraudulent matter in them. I waited in vain to hear Mr. Huddleston show that these wrappers came within the principle of documents which might be the subject of forgery at common law. Speaking for my-

self, I doubt very much whether these papers are within that principle. They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things which are essentially different. It might as well be said that if one tradesman used brown paper for wrappers of the same description as another tradesman, he could be accused of forging the brown paper.

WILLES, J.—I agree in the definition of forgery at common law, that it is a forging of a false document to represent a genuine document. That does not apply here, for it is quite absurd to suppose that the prisoner was guilty of 10,000 forgeries as soon as he got these wrappers from the printer; and if he had distributed them over the whole earth and done no more, he would have committed no offence. The fraud consists in putting inside the wrappers powder which is not genuine, and selling that. If the prisoner had had 100 genuine wrappers and 100 not genuine, and had put genuine powder into the spurious wrappers and spurious powder into the genuine wrappers, he would not have been guilty of forgery. This is not one of the different kinds of instruments which may be the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present, the remedy is well known; the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, and he may also bring an action at law for damages; or he may indict him for obtaining money under false pretences. But to convert this into the offence of forgery would be to strain the rule of law.

BRAMWELL, B.—I think that this was not a forgery, even assuming that the definition of forgery at common law is large enough to comprehend this case. Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document, and that the one is not as efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but the one is improperly used. But the question now is, whether the document itself is a false document. It is said that the one is so like one used by somebody else that it may mislead. That is not material, or whether one is a little more true or more false than the other. I cannot see any false character in the document. The prisoner may have committed a gross fraud in using the wrappers for that which

was not the genuine powder and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery.

CHANNELL, B., concurred.

BYLES, J.—Every forgery is a counterfeit. Here there was no counterfeit. The offence lies in the use of it.

Conviction quashed,*—*London Law Times*.

RECEIVING GOODS EMBEZZLED—INDICTMENT FOR EMBEZZLEMENT, LARCENY, AND RECEIVING.

Reg. v. Frampton.

Case reserved by the chairman of the Dorsetshire quarter session.

The prisoner was tried with two other persons named Wilkinson and Tavender.

The first count of the indictment in the usual form charged Wilkinson and Tavender, as the servants of one Hebditch, with embezzling their master's goods.

The second count charged the same two prisoners with stealing their master's goods.

The third count charged the prisoner Frampton with having been convicted of felony.

The fourth count charged the prisoner Frampton, he having been convicted as in the third count mentioned, with feloniously receiving goods, the property of Hebditch, knowing them to have been stolen.

The jury found Wilkinson guilty on the first count for embezzlement, and acquitted Tavender on all the counts; and found Frampton guilty under the fourth count of feloniously receiving.

It was objected in arrest of judgment on behalf of Frampton, that the jury could not find him guilty of receiving, they not having found Wilkinson and Tavender, or either of them, guilty of stealing.

But the case directed the attention of the court to the fact that the fourth count, although the property charged to have

* Monday, May 10.—The prisoner this day, at the Central Criminal Court, pleaded guilty to the indictment for obtaining money by false pretences, arising out of the same facts. Having been in prison for a month, he was released on his own recognizance to come up for judgment when called upon.

been feloniously received is, in point of fact, the same as in the counts for embezzlement and larceny, is, nevertheless, independent of such counts, being for a substantive felony.

The question reserved was, whether the jury could, under the circumstances, legally find Frampton guilty of feloniously receiving; Wilkinson and Tavender having been indicted for feloniously stealing and embezzling such property, and the prisoner Wilkinson having been found guilty of the embezzlement only.

No counsel appeared for the prisoner.

Porcher for the crown.—The 7 and 8 Geo. 4, c. 29, s. 47, enacts, “that if any clerk or servant, &c., shall fraudulently embezzle, every such offender shall be deemed to have feloniously stolen the same from his master.” This has the effect of constituting the offence specified in sect. 47, larceny; (2 Russ. on Crimes, 168.) Therefore, the conviction of Wilkinson on the first count for embezzlement may be considered as a conviction for larceny, and if so, the conviction of the receiver on the fourth count may be sustained. [WIGHTMAN, J.—Is the fourth count proved, knowing them to have been stolen?] It was, if, as is submitted, you may read “stolen” as “taken;” (Reg. v. Craddock, 2 Den. C. C. 31.) [WIGHTMAN, J.—There is no ground for arresting the judgment here.]

POLLOCK, C. B.—There is no difference of opinion in the court upon the construction of the 47th section of the statute, that the offence of embezzlement should be treated as the offence of stealing. It is very likely that this provision was enacted for the express purpose, instead of passing an Act for the case of receiving goods which had been embezzled, of turning all embezzlements into larceny, and making but one offence of receiving goods feloniously taken or stolen. That being our opinion, the conviction is good.

Conviction affirmed.—*London Law Times*.

EMBEZZLEMENT—RECEIPT BY SERVANT OF AGENT IN THE
NAME OF THE PRINCIPAL—INDICTMENT FOR RECEIVING
ON ACCOUNT OF THE AGENT.

Saturday, May 1.

Reg. v. Thorpe.

Case reserved by the chairman of the West Riding Sessions.
Edward Thorpe was tried before me at the West Riding

Sessions of the county of York on the 26th August, 1857, on an indictment which, in separate counts, charged him "that he, being the servant of Chas. Hardy, on three several days in August, 1856, did receive and take into his possession three sums of money, amounting in the whole to the sum of 6*l.*, for and in the name and on the account of the said Chas. Hardy, his master, and the said money then fraudulently and feloniously did embezzle."

It was proved that Charles Hardy was agent for the Great Northern Railway at Huddersfield, for the purpose of carrying out goods to be there delivered by the company, and that he employed his own servants, and used his own drays and horses, and was answerable to the company for moneys collected by his servants for carriage of goods, and that the prisoner, in August, 1856, was his servant, and that as such servant it was his (the prisoner's) duty to go out with a dray, to take with him goods and a delivery-book, handed to him by James Esplin, a clerk in the service of the Great Northern Railway Company, and to deliver goods according to the directions contained in the delivery-book, and to receive the amount of carriage therein specified as due to the said company, and then to account for the sums so received with the said James Esplin; that he had taken out goods for the said railway company at the time stated in the indictment, and had received from the persons to whom they were directed, for the carriage due to the said railway company, the amounts put opposite to their names and description of goods in the delivery-book, amounting altogether to the sum of 6*l.*, which sums were paid to the prisoner and received by him as due to the company, the receipts for which were given by the prisoner, and made out in the name of the Great Northern Railway Company.

It was also proved that the prisoner never accounted to the said James Esplin for, or paid over to him these sums, nor to his master, Chas. Hardy, but absconded; and the amounts so received and unaccounted for by the prisoner were thereupon paid by Charles Hardy to James Esplin on account of the said company, in pursuance of his arrangement with them in that behalf.

At the close of the case for the prosecution, the prisoner's counsel objected that there was no case to go to the jury, inasmuch as, though the evidence proved that at the time the supposed embezzlement took place the prisoner was the servant of Charles Hardy, as alleged in the indictment, yet it was also proved that the prisoner received and took into his possession the money so said to be embezzled, not in the

name and on the account of the said Chas. Hardy, his master, but in the name and on the account of the Great Northern Railway Company, who were not the prisoner's masters, and, therefore, that the charge stated in the indictment was not proved. I refused to stop the case, and put these four questions to the jury:

1. Was the prisoner Hardy's servant?
2. Did he receive 3*l.* 3*s.* 9*d.*, one of the sums?
3. Did he fraudulently appropriate that sum?
4. Did he receive the money on account of Hardy?

The counsel for the prisoner objected that the fourth question could not be put, as the evidence proved that the money was received on account of the Great Northern Railway Company, and that there was no evidence for the jury as to the present charge as to that fourth question. The jury, without answering the questions, returned a general verdict of guilty.

The question for the opinion of the Court of Appeal is, whether there was evidence for the prosecution to go to the jury on that fourth question, or whether I ought to have directed an acquittal for the reasons urged by the defendant's counsel.

The prisoner was sentenced by me to six months' imprisonment, but admitted to bail until the opinion of the Court of Criminal Appeal could be had.

No counsel appeared on either side.

POLLOCK, C. B.—We are of opinion that the conviction must be affirmed. The indictment is for embezzling money, which it is alleged that the prisoner took into his possession "for and on account of his master;" and it was proved that the prisoner's master was answerable to the company for the money received by him. But it was also proved that the money was received by the prisoner in the name of the company; and the doubt which appears to have arisen is, whether the prisoner having received the money not in his master's name but in the name of the company, the conviction can be sustained. We are all of opinion that the conviction is right. The stat. 7 and 8 Geo. 4, c. 29, s. 47, makes use of the words "for or in the name or on the account of his master." Now it is clear that, although the prisoner received the money in the name of the company, he received it on account of his master.

Conviction affirmed.—*London Law Times.*

LIEN OF THE FIERI FACIAS.

An nostrum inter vos tantas componere lites.

The dispute which has been waged until it has waxed hot, on the subject of this article, might perhaps have been saved, if the section which principally gave rise to it, had been in the first instance paraphrased in the following form, or to the same purport:

"Every writ of *fieri facias*, hereafter issued, shall, in addition to the effect which it has under chapter 187, be a lien from the time that it is delivered to a sheriff or other officer, to be executed, upon ALL the *personal estate*, of or to which the judgment debtor is possessed or entitled, although not levied on or capable of being levied on, under that chapter, EXCEPT, (1) that in the case of a husband or parent, it shall not affect such things as are exempt from distress or levy under the 34th section of chapter 49;* and except, (2) that as against an assignee of any such estate† for valuable consideration, or a person making a payment to the judgment debtor, the lien by virtue of this execution‡ shall be valid only from the time that he has notice thereof; and except, (3) that this section shall not impair a lien acquired by an execution creditor under chapter 187.¶

* The list of these "things" comprises not one that is not a chattel, visible, tangible, in the possession of the debtor, and liable (but for this exemption) to be levied on under chapter 187. Why make a special exception of them, in a particular case, from the operation of the lien created by this section, if it was intended that the lien should not affect any such chattel in any case?

† Not "of all the personal estate." See 3 Quarterly Law Journal, p. 105. In the same page it is said, "We had to see the proposition laid down and attempted to be sustained, that a 'purchaser' of goods and chattels and an 'assignee' of personal estate meant the same thing—that these words described the same character—before we could have believed that any man could have had the boldness to announce such a proposition." That is not the proposition necessary to be maintained, but only that the latter phrase is *comprehensive enough* to take in all that is meant by the former. which it does, together with much more. See Wms.' Real Prop., 52, '3; Wms.' Personal Prop., 32, 100. Smith on Real and Personal Prop., 566, '7. In common parlance, an assignment signifies the transfer of all kinds of property, real, personal and mixed, and whether the same be in possession or in action." 2 Bouv. Inst. 416. See also Com. Dig. tit. Assignment *passim*.

‡ A cautious form of expression, not necessary to have been used, if the lien, by virtue of this section had not embraced anything that could be the subject of a lien of the same writ, under chapter 187.

¶ Why make this exception, proviso, qualification, (call it what you will,) if this section was to have no manner of operation upon anything that could be the subject of a lien acquired under that chapter?

And the construction would have been still more *obvious* if the legislature had not, in the rage for conciseness then prevalent, dropped part of the expression of the revisors, whose draft concluded in these words: "This section shall not impair the lien of any other execution creditor under chapter 187." But it would not have been one whit more *certain*; the meaning of the section, as it was enacted, being unmistakably the same that it was in the form proposed by the revisors. For a very little reflection is quite sufficient, if any reflection at all be necessary, to discover the absurdity of supposing that the execution creditor, protected against the operation of this newly created lien, was the *same*, who was to claim the benefit of such operation, "in addition" to the lien his *fieri facias* gave him under the preceding chapter.

That what has been proposed is an accurate paraphrase, seems to be too clear for either debate or doubt. Had it occurred in time to the first writer upon the subject, in this journal, the *form* of the expression (which *alone* it has altered) would probably have suggested at once to him that one section (in conjunction with that next immediately following it) gave to an execution creditor, in a *fieri facias*, not a *prolongation* of the *same* lien, which under the then existing law would attach, but an *additional lien*, *commencing* at the same time with, *continuing after* the expiration of, the former, *always distinct* from it, and *comprehending* the entire personal estate of the execution debtor; not only *choses in action*, but also goods and chattels of every description, not levied on before the return day of the writ. §

And both he and the judge who decided the case of *Marshall v. Goode*, (3 Quarterly Law Journal, p. 171,) would have perceived intuitively, that while the lien of an *unlevied fieri facias*, posterior to the return day, first created by this statute, was expressly *so moulded* as to not only permit, but require the decision which was made in that case; yet a *lien* and a very important one (*sui generis*, if they please) was thereby brought into being, whose effect is to bind the property as against all volunteers, all purchasers with notice, though for value, and all incumbrancers except (1) such as may be considered assignees for valuable consideration, without notice, and (2) such as have a lien by execution perfected, or capable (in consequence of the return day not being past) of being perfected by actual levy upon the property.

§ From whatever cause the failure to levy may have proceeded, whether that the things were not in the bailiwick of the officer, or that he could not find or did not choose to levy on them.

If there be two execution creditors, a senior and a junior, both of whose executions have become returnable without either of them having been levied, each will have a lien of the same character, with priority to him whose execution was first placed in the officer's hands to be executed; and such will continue to be their relative position, until it shall be changed, by one of them obtaining a fresh execution and having it levied; which doubtless it will be competent for him to do, just as it would be to a third execution creditor, junior to them both; or until the force of the lien is gone in the manner pointed out in the section which defines its duration.

To the present writer, it seems that no point was ever presented less susceptible of real dispute, whether the provision upon which it arises be construed according to the rule ordained by the Code itself, for its own interpretation and that of subsequent statutes,* or according to the ordinary rules of construction; even without but much more with, the help of the argument to be drawn from the several exceptions (in substance, if not in form) grafted upon the purview, whereof one at the least is consistent with the construction above indicated, if it does not actually support it, and the remaining two would be grossly absurd upon any other. He thinks (if he may presume to say what he thinks) that very seldom, if ever, has a legislative intention, more clearly proper, been expressed in terms more explicit and unambiguous; that there is (as to the point in dispute) but one meaning which can be put upon the words, without violently wresting them; and that it is one which probably no *mere* tyro would ever have missed. That it has been missed, is precisely because those who have missed it were not tyros, but learned men;

* The section under consideration has the words, "*ALL the personal estate*," and the Code (Chap. 16, § 17, pp. 100-'1,) enacts that "in the construction of all statutes, the following rules shall be observed, unless such construction would be inconsistent with the *manifest* intent of the legislature:" the words "*personal estate*" shall include chattels, real, and such other estate as upon the death of the owner would devolve upon his personal representative." In a note at these words in the section in question, the revisors called attention to this very definition, as one which had not been given in their draft of chapter 16, but which they had since suggested to the committee of revision, and which that committee had recommended for adoption. This surely must end the strife, if we may make such use of the revisors' reports and notes, as the judges of the Court of Appeals are in the constant habit of doing. See the following instances in a single volume (the latest in print) of our reports:—13 Grat., 149-'50, *Davis v. Comm.*, &c., 445, *Wickham v. Lewis*; 492, *Middleton v. Arnolds*; 659-661, *Hale v. Chamberlain*; 665-669, *Ramsey v. Ramsey's executor*; 731-'2-'3, 736, *Lee v. Hodges*.

learned in the old law, from which, in numerous other instances besides this, such persons have found it difficult to wean themselves as widely as the Code has departed. Hence, in some measure, probably from the want of a good index, still more, the denunciation undoubtedly so common from that large and influential class against the Code, (in this respect, questionless an illstarred compilation,) whose innovations disturb them; *omnis innovatio novitate perturbat*,—perhaps they will add, with Sir Edward Coke against his great contemporary Bacon, *plus quam utilitate prodest*; and hence also the very strong probability that the best expositors of it will be found among *young* lawyers who have learned or will have learned our statutory law mainly from it. As to the temper of the three principal essays, which have appeared upon the subject of this article, if the author of the last will look at certain expressions in the first, respecting what is there called “our present wretched Code,” and its “perpetrators,”—expressions not here repeated, because it is better they should be forgotten,—he will be satisfied, (unless he be *very* partial to the writer of the first article,) that the author of the second, if either himself a “perpetrator” or a friend to any of the perpetrators, among whom were many of the most distinguished men in the state, has allowed himself no greater asperity than may be fairly considered as not transcending what the civilians call *moderamer inculpatæ tutelæ*.

W. G.

LIABILITY OF GUARANTOR.

Jones, sur. part. &c., v. Headen's Committee.

Circuit Court of Floyd County, Va. April Term, 1858.

An endorsement on an order for a quantity of goods, in these words, “I will endorse for *D. L.* the within bill,” is a sufficient guaranty.

A guarantor is not entitled to notice of the acceptance of the guaranty, when the amount guaranteed is fixed in the guaranty itself.

The creditor's failure to institute suit is not a discharge of the guaranty, although the debt may have been lost through delay.

A guarantor is not entitled to notice of the non-payment of the debt, in the absence of any stipulation to that effect.

The word “endorse” does not convert a guaranty into an endorsement, so as to clothe the guarantor with the character of an endorser, and entitle him to notice of non-payment.

D. N. Jones, surviving partner of the late firm of *Simon Bonavita & Co.*, instituted an action of *assumpsit* in Floyd Circuit Court, against the committee of *Dr. Tazewell Headen*, a lunatic. The declaration charged, that one *David Lucas* applied to *Bonavita & Co.* to purchase certain goods from them; that *Dr. Headen*, while sane, agreed in writing to guarantee the payment of the price of the goods; that on the faith of such guaranty the plaintiffs sold the goods to *Lucas*; that *Lucas* never paid for the goods, but became insolvent; and that neither *Headen* nor his committee had paid for the goods. Plea, non-assumpsit.

Nelson & Saunders, for the plaintiff.
Cook, for the defendant.

On the trial the jury found a special verdict, in substance as follows: That on the 28th Nov'r, 1854, one *David Lucas*, desiring to purchase a quantity of confectionary, wrote from Jacksonville, in Floyd, to the plaintiffs' firm in Richmond, a letter, requesting them to forward him the goods; that to his letter he prefixed a bill, or list of the articles wanted, setting out clearly the quantity and quality of each article; that *Lucas* desired the plaintiffs to give him four months credit; that the letter and annexed bill of goods were written on the same page, and on the back thereof, *Dr. Headen* made the following undertaking:

"*Floyd C. H.*, Nov'r 28th, 1854.

MESSRS. S. BONAVITA & Co.

Gentlemen—I will endorse for *Mr. David Lucas*, the within bill. I am not acquainted with you, and will refer you to *Wadsworth, Turner & Co.*, or *Richardson*, or any of the large wholesale houses in Richmond.

T. HEADEN."

That on the faith of this undertaking of the defendant, the plaintiffs, on the 7th December, 1854, sold and forwarded to *Lucas*, goods corresponding to the bill, and amounting to \$98 50 cents; that they allowed him four months credit; that on the 7th April, 1855, when the money became due, *Lucas* was entirely good for the debt, and it could have been made out of him without difficulty, had proper steps been taken to collect the claim; that he so remained good during the year 1855, but in February, 1856, he became insolvent, and absconded, but considerable debts were made out of him by creditors who pursued him, and seized upon property

which he was carrying off; and that he was last seen by his creditors in Tennessee, whither they had pursued him, and then had property in his possession; and that no part of the plaintiffs' debt has been paid. The verdict concluded in the usual alternative form.

The questions made by the defendant's counsel, and the authorities upon which the court acted, are sufficiently set out in the judgment.

FULTON, J. In the first place, I have to decide whether this be a guaranty binding on the defendant. I have not seen any undertaking expressed in the same terms in any of the cases. But the authorities lay it down that there is no particular form in which a guaranty is to be expressed. *Parsons on Contracts*, vol. 1, p. 495; *per* LEE, J. in *Moore v. Holt*, 10 Grat., 284. I think this can be considered nothing else but an agreement of *Dr. Headen* to pay the debt if *Lucas* failed so to do. I do not think he intended to use the word "endorse" in its strict legal signification of an act applicable to a bill, note or other negotiable instrument, but in its more popular sense, as expressing a willingness on his part to see that the debt should be paid, and the plaintiffs protected from loss. I think it substantially only an ordinary guaranty.

In the next place, was *Dr. Headen* entitled to notice of the acceptance of the guaranty. He did not, in the guaranty itself, stipulate for or require any notice: will the law imply it as a part of the contract? In *Wadsworth, &c., v. Allen, &c.*, 8 Grat., 174, the Court of Appeals held that notice of acceptance was waived by the requisition of notice of *default of payment*; but the court there does not decide that notice of acceptance is necessary in any case. That question is left open, and I have not been referred to any other Virginia case bearing on the question. How stands it elsewhere? Judge *Parsons*, in discussing this question, at page 500 of the volume already cited, lays down the general rule to be that the guarantor is entitled to notice of acceptance, and of the amount advanced upon the faith of the guarantee; but then he also lays it down with the exception that such notice is not necessary, when the amount is specified in the guaranty itself. Nor is it necessary where the guaranty and the acceptance are cotemporaneous acts. Here we cannot say that those acts were cotemporaneous, for the guaranty was given on the 28th of November, and not accepted till the 7th December. But I think this case falls within the other branch of the exception. It is true that the *amount* of the bill of

goods was not fixed; but then the quantity and character of those goods was fixed: and the price was a mere matter of inference. The defendant guaranteed payment of *that bill of goods*: he saw what *Lucas* was about to buy: he did not require to be informed of the price, as he might have done. I think this undertaking, of itself, fixes with sufficient precision the amount which it was intended to secure; and the guarantor himself requiring no further notice, I hold that the case falls within the exception to the general rule, and that notice of acceptance was not necessary.

The next question is, whether the defendant was entitled to notice of the principal debtor's default of payment. In the absence of a finding of any such notice by the jury, it is to be taken that none was given. Was it necessary? This leads to an enquiry into the legal character of a guarantor. I think there can be no question as to the proposition that a guarantor is only a *surety*; subject to all the burdens, and entitled to all the privileges of a surety, and none other. There is a broad distinction between his case and that of an endorser. In the latter case the defendant would have been entitled to notice of non-payment, and in default thereof would have been discharged; and his counsel has tried to bring him within the influence of that rule. But I have already said, that I do not consider him an endorser; that I think the word "endorse" is not here used in its strict technical meaning; and that the defendant is not entitled to the privileges of an endorser. I hold him only a guarantor, in other words, a mere surety. Now, I think it impossible to maintain the proposition that a *surety* is entitled to notice of the principal debtor's default of payment; indeed the defendant's counsel did not contend for such a proposition. He went on the ground that his client was to be held only to be what he called himself,—an endorser. If any authority is needed, it is found in 2nd Saun. Plead. and Evid., page 153, where, in treating of this matter of guaranty, it is laid down that "in general, the neglect of the obligee to give notice of the default of the principal, does not discharge the surety." It is true, that a guarantor is a surety of a particular character: he may prescribe the terms upon which he will be bound, as is stated in *Wadsworth v. Allen*, before mentioned; but if he prescribe no terms, he is bound by the general rule; and here no terms are laid down at all. I must therefore hold, that the failure to give notice of non-payment does not affect the claim.

Only one other question remains. This debt could have been made out of *Lucas*; and it is the plaintiffs' *laches* that

has thrown the burden on the defendant. Does this discharge him? The authorities are innumerable to the effect that it does not. Mere delay on the creditor's part, does not exonerate the surety. It was *Dr. Headen's* duty, in this instance, to have hastened the collection of this debt, by notice to the plaintiff to proceed. The Code, ch. 146, sec. 4, p. 587, in so many words, gives him an opportunity to protect himself, and having failed so to do, he must bear the loss. He required no notice from the plaintiffs; he gave none to them. I must give the plaintiffs judgment for the sum found by the jury, and interest.

Judgment accordingly.

FORFEITED LAND.—JUNIOR PATENTEE ENTITLED.

Lundy vs. Lundy.

Circuit Court of Grayson Co., Va. April Term, 1858.

Although land has been once granted by the Commonwealth, yet if it is delinquent or forfeited for non-payment of taxes, it is liable to entry and survey, and a junior patentee may acquire good title thereto.

Land claimed under a *settlement right* must have been surveyed, and the survey recorded, in pursuance of the directions of the statute, to enable the holder to claim the benefit of the Commonwealth's right thereto.

Land claimed under such *settlement right* is, like any other land, liable to forfeiture for non-payment of taxes, or omission to have it charged with taxes.

Ejectment in the Circuit Court of Grayson, by *Elisha Lundy* against *Amos Lundy*. The declaration claimed, in fee simple, a tenement of ninety-four acres. Issue was joined on the statutory plea of *not guilty*.

Cook & McCamant, for the plaintiff.

Brown, for the defendant.

The plaintiff read in evidence a patent for 94 acres of land, dated May 1st, 1854, and proved that it covered the tenement in controversy; and also proved that he had been assessed with and paid taxes thereon since the patent issued.

The defendant read in evidence a patent to his father *John Lundy*, dated in 1796, for one hundred acres. He further read the will of *John Lundy*, whereby the testator gave all

his land "lying north of the Little River road" to his daughter, and all that lay south of that road to the defendant. This will was made in 1830. The defendant contended that this patent covered the land in controversy; and it being shown that the ninety-four acre tract lay south of said road, defendant insisted that it belonged to him under his father's will. But it was shown that the lines of the *John Lundy* patent, as contended for by the defendant, included no less than three hundred and sixty acres, instead of one hundred; there being two hundred and twenty acres on the north side, and one hundred and forty acres on the south side of the Little River road. None of the lines or corners of the *John Lundy* patent were clearly established: the plaintiff, in fact, contending that that patent could not be identified at all; and that if it could, it did not embrace his ninety-four acres.

The defendant further proved that he had lived on the land lying south of the road, and embraced in the plaintiff's patent, for nearly forty years; having settled upon it in his father's life-time, and by his permission: that he, the defendant, had built a house thereupon, had cleared much of the ninety-four acres, and cultivated it more than thirty years, and was still living in the house which he had occupied during all that time. He showed from the commissioner's books that *John Lundy* had paid taxes on his hundred acre grant until his death; and that since his death, the same quantity and description of land had been charged to, and the taxes paid by *John Lundy's* daughter, to whom had been devised that part of the land lying north of the road. But the land books showed that no land had ever been charged to the defendant, except in a single year, 1841, when he was charged with *fifty* acres, and paid *three cents* of tax upon it.

Upon this evidence *Brown* asked the court to give the jury two instructions:

1st. If the jury believe that the land in controversy is included in the limits of the patent to *John Lundy*, then they must find for the defendant, because the commonwealth having once granted the land, cannot again grant it; that it was no longer liable to entry, and the plaintiff's patent is void.

2nd. That if the land embraced in the plaintiff's patent was settled more than twenty years prior to the entry made by the plaintiff, and taxes paid thereupon in any year of that period, the commonwealth's right to the same was relinquished, the plaintiff's entry, survey and patent were void, and the jury ought to find for the defendant.

In support of the first instruction the counsel referred to

Lomax's Digest, (new ed.,) vol. 2, p. 504, and the authorities cited in the notes.

To sustain his second instruction the counsel referred to the Code, ch. 112, sec. 36, p. 484, and to the case of *Tichanal v. Roe*, 2d Rob. Rep., 288. He contended that the payment of taxes by *John Lundy* was a sufficient payment upon that part of the land held by defendants; also the payment by the other devisee of taxes upon the whole tract; and even if mistaken in this, that the payment of even *three cents* in 1841, was enough, provided the jury thought it was paid on account of the land in controversy.

The plaintiff's counsel combatted both the positions assumed by the other side. They contended that Judge Lomax was mistaken in laying it down that forfeited and delinquent lands were not open to entry and survey. He brings his review of the cases down no farther than 9th Grattan; had he waited for the appearance of 10th Grattan, he would have seen no less than three cases, *Staats vs. Board*, 400, *Wild vs. Serpell*, 405, and *Hale vs. Branscum*, 418, all deciding that lands forfeited for non-payment of taxes, or for failure to have them entered on the land books and charged with taxes, may be again entered and patented, and the forfeiture shall enure to the junior patentee who may have paid his taxes. But it is very strange that he should have overlooked the act of March 5th, 1846, Sess. Acts, 1846-7; p. 7, copied into the Code, ch. 114, sec. 1, p. 495; upon which, and similar acts of the like character, the cases before mentioned were decided. Still more plain is the 3rd section of this chapter of the Code, which in so many words enacts that delinquent and forfeited lands, not sold by the sheriffs, nor vested in junior grantees, "shall be liable to entry, survey and grant in the same manner as waste and unappropriated land." As to the *settlement right*, they submitted that even if upon the facts in evidence, the defendant could ever have set up such a right, that it too was forfeited. It was his duty to have it surveyed, and the survey recorded, and then to have it charged with taxes; and if he neglected so to do, after the twenty years, then any such right was also forfeited.

In answer to the suggestion that payment of taxes by the owner of one part of a tract, charged with taxes as an entire tenement, would avail the delinquent owner of another part, they referred to page 182 of the Code, secs. 24, 25 and 26, as showing that such a pretension could not be sustained; and that it was the defendant's duty to have had *his own part* of the land *laid off*, and charged with taxes.

FULTON, J. I cannot give either of the instructions asked by the defendant.

The first embraces a proposition that is wholly untenable. Though land may have been once granted by the commonwealth, yet if it has been *forfeited*, either by omission to enter it upon the land books for taxation, or for failure to pay the taxes when assessed, it is, by the express language of the statutes, made again liable to entry and grant; and the court of appeals has in several cases enforced that liability. I do not see how any writor could have fallen into a mistake on so plain a question.

The second instruction is also objectionable. It rests upon the enactment that "no entry on any lands which have been settled for twenty years prior to the date of such entry, and on which taxes have been paid at any time within the said twenty years, shall be valid, and any title which the commonwealth may have thereto is hereby relinquished;" and the enactment then goes on to provide that a party in possession, and claiming the benefit of such settlement and payment, may have the land surveyed and the survey recorded. Now I think that to bring himself within this provision the claimant must have made his survey, and done the other acts required by the statute; but it is not necessary to decide that question absolutely; because this right by settlement and payment of a single tax, may also be forfeited. There is nothing in any of our statutes exempting such a title from the ordinary operation of the law of forfeiture. Having once acquired title in this way—having held the land twenty years, and paid *some tax*, the owner must *continue* to pay the taxes as other landholders; and he omits so to do at his peril. He ought to make and record his survey, and pay taxes as others do.

As I cannot give these instructions, I must state to the jury my view of the law governing the case. If they find that the tenement in controversy is embraced in the *John Tundy* patent, and that taxes have been paid on all the land in that patent, then they should find for the defendant; if they find either of those facts in the negative, their verdict should be for the plaintiff.

No exception was taken to this ruling: the jury found *for the plaintiff*: there was a motion for a new trial, but it was overruled, and judgment given for the plaintiff for the ninety-four acre tenement.

MILLER & MAYHEW v. DAVIS.

In the Supreme Court of Appeals of Virginia.

This case, settling a principle in regard to the character of negotiable paper past due, heretofore undecided by our courts, is so important, that in default of room for a full report, (which we propose hereafter to give,) we present our readers with a very brief abstract of the facts and decision.

E. L. Fant & Co., being in debt to Miller & Mayhew, and having in the Merchants' Bank of Baltimore various notes, due to them, pledged to the said Bank, as collateral security for discounts, on the 30th May, 1850, gave Miller & Mayhew an order upon the said Bank for the collaterals when discharged from the lien of the Bank, which order was presented and accepted.

On the 12th March, 1850, the said Bank discounted for Fant & Co. the note of R. M. Davis for \$694 75, payable at the Exchange Bank in Richmond 28—31 July, 1850. The note of Davis was protested and returned to the said Bank. On the 6th August, 1850, Miller & Mayhew loaned to Fant money, with which he retired the said note, and immediately delivered it to them as collateral security. On the 9th of August, R. M. Davis paid to Fant & Co. the amount of the note and took their (Fant & Co.'s) receipt. Miller & Mayhew brought suit upon the note in the Circuit Court of Essex. At the trial, having proved the circumstances above detailed, except the payment by Davis to Fant, Davis, the defendant, offered Fant's receipt, dated the 9th of August. The plaintiff moved the court to instruct the jury that upon the facts proved, the said receipt constituted no defence to the action. Which instruction the court gave. Verdict and judgment for plaintiff. The defendant excepted to the instruction and appealed. The Court of Appeals held the instruction to be correct, and confirmed the judgment.

Morson for appellants.

Griswold & Claiborne for appellee.

THE PRACTICE IN COURTS OF JUSTICE IN ENGLAND AND THE UNITED STATES.

By *Conway Robinson*, of Richmond, Virginia. Volume 3rd. Treating of Personal Actions, with respect to parties who may sue and be sued; the Form of Action, and the Frame of the Pleadings.

When we received advance sheets of this volume, we expressed our opinion in regard to it. Mr. Robinson's work promises to be a very valuable institute of the law, and if he lives to finish it, it will no doubt command the support of the profession in other States as well as in our own. In this volume the thorough and accurate learning of the author is displayed, we think, more fully, and in a way more practically beneficial, even than in the volumes which preceded it.

THE QUARTERLY LAW JOURNAL.

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THE COMPETENCY OF WITNESSES.

We entertain a high degree of respect for the common law, though not prepared to concur in the opinion of its great champion, Lord Coke, that "the common law is the perfection of reason." To one of its principles we cherish a decided objection: to that doctrine or rule which excludes every witness who has any direct interest in a cause which is to be tried. We consider this rule to rest on no sound foundation: to be deduced from unwarrantable premises: to ignore the real influences which control men, and to be a most potent instrument of injustice, corruption, chicanery and unnecessary litigation.

This rule of exclusion rests on the supposition that every man will commit perjury when he has any pecuniary interest in so doing. It matters not whether that interest be great or small: whether it involve the title to the best estate in the Commonwealth, or only a dollar in controversy before a Justice of the Peace. Nay, so far is it carried, that a mere liability to costs, in a case wherein the party's interest is otherwise balanced, is sufficient to exclude him—as in the late case of *Brown v. Johnson*, in 13 Grattan; a case in which the doctrine was pushed to a conclusion which, though legal and unquestionable in a professional point of view, is one which strikes us as absolutely revolting when viewed merely in the light of propriety, convenience and justice. Of course no one would be guilty of the indecency of censuring the court for decisions of this character; the fault lies in the system which they have to enforce, and the absurd rule by which they are fettered.

The foundation of this rule is a falsehood. It is not true that all men will commit perjury at the prompting of interest. Many will do so; but we believe that the great majority will not be so guilty. Some men would swear a lie for a dollar, or for less, while thousands would not tempt others to swerve from

the truth. Now, if there be a single man whose integrity would stand the test of interest, then the rule is fallacious and unjust. Though ninety-nine men out of the hundred would yield to the temptation, that is no just reason for casting obloquy and inflicting injustice upon the other, whose honesty is unquestionable. He has the right—the *natural right*—to be heard in asserting his demand or urging his defence; and to deprive him of that right, is to inflict upon him an injury as insulting as it is unjust.

Men do not admit that this rule is well founded in their ordinary intercourse with each other. Bad as human nature may be, and harsh and cynical as may be the view which we too often take of it, no man in his senses acts upon the presumption that all other men are liars, even in matters which affect their interests: and liars, too, so deeply immersed in duplicity that they are to be believed under no circumstances, when their money or property is in question. He may see in such circumstances good reason for caution and watchfulness—nay, even for distrust, so far as many and perhaps most men are concerned; but he does not, therefore, go to the extreme length of not only disbelieving all men, but of actually refusing to hear all men when their interests are involved in the enquiry. On the contrary, he is accustomed, not to receive their statements with implicit credence, but to make such allowances as experience may have taught him to be necessary, when looking to their interest, their prejudices, their passions, and their partialities. In short, he reverses the legal procedure, and allows the objection of interest to go to the *credibility*, not to the *competency* of the party.

And the rule is most ludicrously inefficacious to produce the effect which it is designed to promote. Its only application is to the parties on the record, or to those who may have some direct pecuniary interest in the result. Innumerable are the instances in which persons, having the most manifest interest in the result of the controversy, are witnesses as to whose competence no question can be raised. It is hardly necessary to mention them, for the experience of any actively employed lawyer will recall them by scores. One or two extreme cases, however, counter-parts of which are afforded by the writer's experience, may be mentioned as illustrations. A man of extreme age becomes involved in a litigation affecting his whole estate. His only son is introduced as a witness. He knows, and so do court, counsel and jury, that *he* has far more real interest in the controversy than his imbecile parent, whose estate must soon devolve upon the witness—for the father has made no will, and is so far reduced in mental vigour that he never can make one—nay, he

may already be under the care of that son as a committee; yet that son and heir is a *competent* witness. Again, the customer of a retail merchant contends that he has paid twenty dollars for which no credit appears in his account. He alleges that he paid the money to a salesman. The merchant and the customer may both be men of wealth, to whom twenty dollars would be a trifle; and men of integrity not to be corrupted. The agent may be very poor—one to whom that sum is important: he may be a man of dubious character; and what is vastly more important to him, if it appear that he received the money and failed to account for it, he is guilty of embezzlement, and may land in the penitentiary; yet under this *wise* and *consistent* rule neither of the parties can be heard, while the clerk,—the very man whose conduct and responsibilities are called in question,—is a *competent* witness. But it is needless to multiply examples.

This rule assumes that men are trustworthy under all influences save that of avarice. Love, friendship, ambition, envy, are all ignored when we look to the question of competency. The dearest interests of father or child, friend or foe,—his life, liberty, honour or fortune, may be at stake: the most potent influences and tremendous temptations may be operating upon the witness; things may be in issue in comparison with which mere dollars and cents sink into insignificance; yet if the deponent have *no money* at risk, he is a *competent* witness. All these powerful motives and weighty temptations go only to his *credibility*. One dollar is, by legal wisdom, presumed to weigh more, not only than his reverence for truth, but the strongest emotions of his nature: his love, his friendship, his revenge, his malice. One sentence may save or shatter the fortunes of a beloved brother: may blast the reputation of an idolized son, or preserve the fair fame of a cherished daughter; still the law, to the honour of human nature, presumes that that sentence will be truly spoken, and takes the veracity of the witness for granted, till his falsehood is established by contradictory testimony, or his credibility shaken by proof of notoriously bad character. Let but a single cent of his own estate be implicated, and the truthful man is held to be a perjurer, the honest man to be a swindler, the just man to be a designing knave, incapable not only of speaking the truth, but even unworthy of a hearing.

This rule tends to break down the barriers between virtue and vice: to efface the distinction between the just and the corrupt. When men are called to testify in the affairs of others, their moral characters are put in a most conspicuous light. The witness box is an ordeal through which a man of doubtful or notoriously bad character cannot hope to pass un-

scathed. In no other position is the value of a "good name" made more manifest. And why should it not be so if the party be testifying in his own cause? A good and truthful man is contending with a base and dishonourable one; is it justice, or reason, or good policy, that they should be placed on the same platform as to credibility? Is it not a virtual declaration that the law considers virtue of no more value than vice: that a good character shall, in the merest trifle or the utmost extremity, avail no more than a bad one? So far as the law of evidence (or rather we should say the rules of competency) can produce that effect, the tone of society is lowered and the value of a good character is depreciated.

Nor can we claim even the poor merit of consistency in the application of this rule. Our whole course of procedure founded on affidavits is a standing proof of the absurdity of the main principle itself. The most important results may, and often do, depend upon a continuance, yet the party is not only allowed but required to testify to the materiality of his absent witness, and to his own diligence in seeking to obtain the testimony. So in the case of a missing paper, in applications for new trials on the ground of surprise or after-discovered evidence, and others too numerous for detail. We think the experience of our professional brethren will bear us out in the assertion, that in these collateral matters there is as much temptation to perjury and perhaps as many instances of its commission, as there would be in the trial of the issues themselves. And in these cases we run into a contrary extreme. As we blindly refuse to believe or even to hear the party, at the trial, when the whole case is before us, and we have an opportunity to cross-examine him—so we, on these collateral matters, just as blindly refuse to disbelieve him, or at any rate, to hear any evidence tending to shew that we ought not to believe him. On the one hand we refuse to hear him at all for fear that he commit perjury: on the other we tempt him to forswear himself by removing all competing testimony, and allowing him to swear what he pleases. Here, again, the good man and the bad one are put upon an equality: the oath of the one weighs as much as that of the other. How often is the lawyer compelled to sit still and see a rascal swearing himself into a continuance or new trial, without contradiction,—when he feels satisfied that if he had the scamp in the box only five minutes, he could exhibit his falsehood and knavery in the true colours. In these cases our over-credulity is a match for our over-caution upon the trial.

By their adherence to this rule our courts and lawyers partially stultify themselves as well as the juries who try the issues. English and American jurists are loud in their praise of trial by

jury: its chief excellence being the capacity of juries, from their experience in the affairs of life, to judge of the credibility of witnesses and the weight of evidence. They are yet more lavish of commendation in regard to the necessity and propriety of *viva voce* testimony, and the cross-examination of witnesses. Those practises are certainly most important, if not indispensable to the attainment of justice. But why not apply them to the parties? We do not despair of extracting the truth from a witness when his warmest feelings or most deadly passions are excited. We do not hesitate to encounter the father, the son, the friend, the enemy, the rival of the party: why should we fear the party himself? We can make allowances for the passions, the prejudices—even the most potent emotions of the witness. Is the party made of other flesh and blood that we cannot see, nor hear, nor comprehend him? Is avarice more unmanageable than envy? Is the dollar more potent than love or friendship? Can we not, in case the party's interests are concerned, bring to bear upon him the same mode of investigation and course of reasoning to which he is subject when any other motive is called into play? To say that we can deal with all other impulses than the love of money, is to confess ourselves vanquished in our own field by an enemy less powerful than others that we are daily conquering. Let but the party be subjected to the publicity of the witness box, and the fiery ordeal of cross-examination, and he will be found no harder to manage than another witness of like character: no more formidable than if he were testifying in the cause of another in which he felt deep concern.

The great object in all judicial investigation is, to ascertain the facts, to which the law is to be applied, that justice may be done in the premises. Reasoning *a priori*, we would suppose that application should first be made to those who know most about the facts. The parties themselves are those who should be presumed, as a general rule, to be best able to give the necessary information; and the first step of any person, not indoctrinated with the maxims of the common law, would be to go to the fountain head, and make inquiry of parties concerned. He would not feel himself *bound to believe* their statements; but would surely think he had neglected an important means, perhaps the most important of eliciting the truth if he failed to hear their statement of the transaction. Every man ought to know his own business; and it is not a very violent presumption to suppose that his own knowledge of his own affairs is more thorough and accurate than that of another. But we voluntarily exclude the benefit of this information; and presuming that all men will falsify the truth when it is their in-

terest so to do, content ourselves with second knowledge. The means most suitable to effect the very end we have in view, is that which we most sedulously avoid. The sun is often obscured by clouds, yet men do not exclude his light and depend upon lamps.

Our own legislation shows the inconvenience and injustice of this rule. We have done something towards its modification at last, and the tendency is towards its abrogation. The misfortune is, that these efforts have all been made in an awkward, half-hearted sort of way that has deprived them of all real efficiency. Our plan of interrogations is not only one-sided, but almost wholly impotent. The questions are written down; the respondent has leisure, aided by adroit counsel, to frame his answer; and what is still more important, those answers are prepared in secrecy, and free from the observation and comment of the other party. The thing that is wanted to ensure, at least, the merest possible approximation to the truth, is to put the party *in the witness box*: examine and cross-examine him in presence of the court, the jury, the counsel, the other party, and the by-standers: let him endure that ordeal which is so potent in the extraction of truth from others: let him not understand what questions are to be asked: give him no opportunity to prepare studied and evasive answers: in short, subject him to the treatment of other witnesses; and we venture to assert that his testimony will be found just as trustworthy, and no more so, as in a case in which he had no pecuniary concern. But the great disadvantage of the plan of interrogatories is its one-sidedness. It does not enable a party to introduce his own testimony in his own behalf. It merely affords him an opportunity (and a very poor one it is) to extract something from his adversary; but for himself he must remain silent. What gross injustice is, by this necessity, often inflicted on honest men, we all know. Nothing is more common than to assert demands and set up defences that are known and felt to be unjust, for the very reason that the opposite party will not be allowed to speak a word of explanation. No lawyer has failed to have cases in which he was satisfied that the other party was speculating on the enforced silence of his client, a simple word from whose lips would place the matter in its true light.

Though the system of interrogatories is clearly a failure, some of our other provisions intended as relaxations of the rule, shew that it is the privacy of answering the interrogatories, and the impunity with which false and evasive answers may be manufactured, which deprives the system of all efficiency.

In proceedings against the putative fathers of illegitimate children, and in cases where executors, trustees, &c., are per-

mitted to testify, no difficulty has arisen. In many cases the parties have been laid open to the suspicion of tampering with the truth; but not more frequently than in other causes where *competent* witnesses alone were examined. It is about as easy to tell when the party is swearing the truth as when an ordinary witness is so doing.

Our system of jurisprudence has been chiefly borrowed from England; and we have sometimes shewn rather too much alacrity in imitating her modifications of that system. In the matter now under consideration, she has set us an example worthy of mature reflection, if not of imitation. She has abolished this absurd rule of excluding from the witness box the parties interested in the controversy. This important reform in the administration of the law was introduced with that caution which is so characteristic of the English mind. On the re-organization of their county courts, it was provided that the parties to the controversies, depending before those tribunals, should be examined on the trials. Several years' experience showed that little, if any, evil, and a vast amount of good resulted from this relaxation of the old restriction, and it has been gradually extended, until now in all the courts of the kingdom, the plaintiff and defendant are as frequently called as any other witness. Many volumes of reports have been published since this change was made: thousands of parties have been examined and causes determined on their testimony. Yet we have no word of complaint from the judges and jurists of Westminster Hall. They seem as capable of eliminating the truth from the statements of the parties as from those of *competent* witnesses.

This example has been followed in New York, and we believe in Connecticut; and we do not learn that there is any ground of complaint as to the operation of the new rule in either of those States. That it is destined to be generally adopted we have no doubt, though the influence of prejudice and thoughtless attachment to an antiquated absurdity may long defer the acceptance of an important improvement in the administration of justice.

So far as we have been able to learn the details of this modification in the old doctrine, it does not seem to have been applied to the trial of criminal charges. The maxim *nemo tenetur seipsum accusare* has not been disregarded. Nor do the rules in relation to *privileged communications*, as those to counsel, &c., seem to have been abrogated. It is only in civil actions that the restriction has been removed; and the removal does not authorize the introduction of evidence not before admissible. That evidence is derived from a new source—it comes through a new channel, but still retains its old character. The old rules

as to relevancy—materiality, the requisition of the best testimony, &c., are still retained. Where written or record evidence may have been necessary, it is yet required. In short, the change seems to be only that the party is, or may be, examined as any other witness—liable to the same penalties, subject to similar treatment, and entitled to the same protection.

It would seem useless to speculate upon the probable effects of a measure which has never even been authoritatively presented to the consideration of our people; nor do we intend to enter at any length upon such an unprofitable task. One or two points, however, may be briefly indicated. Among these are the greater cheapness of litigation, as well as its greater despatch, resulting from the want of fewer witnesses. The crowds of witnesses now called to our court-houses would be, to a great extent at least, rendered unnecessary if the contest could be decided upon the testimony of the parties. For the same reason there would be greater celerity in the trials. Fewer witnesses would render fewer continuances necessary; and indeed the trials would not be so protracted.

It is very doubtful whether such a change would tend to the increase or the diminution of litigation. While it would tend to put down much unjust, unnecessary, and vexatious controversy, it might probably give rise to some suits of that character; and we believe that many just claims and defences, now considered hopeless, could then be made and enforced. We know of one instance, at least, in which a person, against whom a claim was made, has several times admitted his liability when he and the claimant alone were present; but always denies it in the presence of others.

The only really important objection to such a change, is the idea which lies at the root of the principle itself: the danger, or supposed danger of perjury, if the parties be allowed to testify. In addition to what we have already said, we only desire to impress upon the reader's mind the reflection that we are not obliged to believe the parties any more than to give implicit credence to other witnesses. We are not seeking to make the parties *credible*, though our present course renders them so when admitted at all; we only desire to make them *competent*. We would have their statements on oath made in open court, to be weighed by the jury as any other testimony; subject to all the precautions and safeguards which attend and surround the evidence of other witnesses: and we cannot help believing that this is a more just, sensible, and convenient course than that of total exclusion as the general rule, with exceptions which go to the other extreme, and leave us no protection against barefaced perjury.

(Reported for the Law Journal by the Clerk.)

LIABILITY OF RAILROAD COMPANIES.

State of Mississippi: High Court of Errors and Appeals: April Term 1856.

The Vicksburg and Jackson Rail Road Company vs. William S. Patton.

Common Law: How far in force here. The Common Law of England is the law of this State only so far as it is adapted to our institutions, and the circumstances of our people, and is not repealed by statute, or varied by usages which by long custom have superseded it.

Common law: Enclosures: Cattle damage feasant: Trespass: By the common law, the owner of cattle, horses, &c., is bound to keep them within a sufficient enclosure; and if he permit them to escape and wander upon the premises of another, whether inclosed or not, he is liable for the trespass, and the cattle so trespassing may be distrained *damage feasant*. But this rule of the common law is not adapted to the circumstances and condition of the people of this State, where the population is not so dense, and there are large tracts of uncultivated and unenclosed lands fit for the pasturage of cattle; and, moreover, the people of the State have, from its earliest settlement, permitted their domestic animals to run at large upon the "range," and depasture on unenclosed lands: and hence the rule is not in force here.

Trespass: Cattle, etc: Common pasture. In this State, the owner of cattle, horses, &c., which are not of a dangerous character, may lawfully permit them to range at large on unenclosed commons: and if, in so doing, they wander upon the premises of another not enclosed by a lawful fence, he is not liable for the trespass, and they cannot be distrained *damage feasant*.

Real estate: Rights of owner. The owner of unenclosed land may prosecute his lawful business thereon, but in so doing he must exercise reasonable care and diligence to avoid injuring the cattle of others, which may have wandered on the premises.

Rail road: rights and liabilities of, as to injuries to cattle, &c. A rail road company has the exclusive right to the use and possession and enjoyment of the land upon which their track is located, and they may run their engines and cars on the same at whatever time and with whatever speed they see proper, not inconsistent with the safety of the persons and property committed to their charge: but this right over the land is not higher nor more extensive than that of the original owner: and, hence, if their track be unenclosed, they must run their engines and cars with reasonable care and prudence, so as to avoid injury to cattle which may be depasturing on the track: and if they fail to do so, they will be liable for the injury done.

Rail road company: duty as to track, &c. A rail road company is bound by law to keep the road and machinery in good order, and to have a sufficient number of faithful and trustworthy employees to manage and con-

trol the running of their engine and cars : and if, by their failure in any of these respects, the cattle of another depasturing on their unenclosed track be injured or destroyed, they will be responsible to the owner in damages.

Damages : Mutual fault. Though there be negligence or fault on the part of the plaintiff, remotely connected with the injury, yet if the defendant's fault or negligence was the immediate and proximate cause of the injury, the plaintiff may maintain his action for damages.

Principal and agent: Evidence of general character of agent, when admissible. It is competent for a plaintiff, on the trial of an action against a rail road company for damages done by them to his property, by the negligence and careless running of their engine and cars, to introduce evidence to show that the general character of the engineer in charge of the train when the injury was done, was that of a reckless and untrustworthy agent.

Damages : Exemplary, when allowable. The jury may allow exemplary damages against a rail road company, if it appear that the property was destroyed or injured by the gross negligence, or wilful and wanton mischief of its agents.

In Error to the Circuit Court of Rankin County :

The defendant in error brought his action in the court below, for the recovery of damages, alleged by him to have been sustained by reason of the killing of several horses belonging to him, through the negligence and misconduct of the agents and servants of the R. R. Company, in running their engines and cars over them.

The defendant below pleaded the general issue, and on trial of the issue joined, a verdict and judgment were rendered for the plaintiff.

The value of the property destroyed was proven to have been \$500, or \$600, and other damage is shown to have resulted from the injury. The verdict was for \$1211 90 which exceeded the value of the property and actual damage proved : and the defendant below moved for a new trial, assigning as reasons therefor, 1st. That the verdict was contrary to law and evidence, and 2d. That the damages were excessive. The motion was overruled, and exceptions were filed to the overruling of the motion, and the case was thereupon brought up on writ of error for that reason, and for alleged errors in the rulings of the Circuit Judge on the trial, to which exceptions had been duly filed.

The cause was argued, in the court below, by Messrs. George L. Potter and Geo. T. Swann, for the Plaintiff, and by Messrs. John D. Freeman and T. J. Wharton for the Defendant.

In this court the case was argued elaborately by Messrs. T.

J. Wharton and F. Anderson for the plaintiffs in error, and by Mr. Potter for defendant in error: and was submitted also on written briefs by them, and by Messrs. Freeman and Dixon for plaintiffs in error.

The evidence on the trial is so fully stated in the opinion of the court, that it is unnecessary to state it: and the instructions to the jury in the circuit court are so numerous that they cannot well be here inserted, as they substantially appear from the opinion.

The case is fully reported in 31 Miss. Rep. 156, 198.

The following opinion of the court was delivered by Mr. JUSTICE HANDY:

This action was brought by the defendant in error against the plaintiff in error, to recover damages occasioned by the locomotive and cars of the Rail Road running over and killing, or wounding, several horses and a mule belonging to the defendant in error; which injury is alleged to have been caused by the negligence, mismanagement and improper conduct of the Rail Road Company, or its agents.

It appears by the evidence in the record, that the injury was done in July, 1851, when the cars were on their usual morning trip from Brandon to Jackson; and that the slaves of Patton had rode the horses to the place where they were at work in the woods, about a mile from the residence of Patton, and along a neighborhood road which crossed the track of the Rail Road, and which was the road used in going from Patton's residence to the place where his slaves were at work. The animals appeared to have been turned loose to pasture, their owner being in the habit of pasturing them upon unenclosed and uncultivated lands adjoining the Rail Road track owned by other persons, and which had been used by the neighborhood generally for pasturage, for a great number of years, without objection, such animals having been accustomed to run at large for pasture in the neighborhood, since, at least, the year 1829. About the time the injury occurred, one of the horses was seen by a witness, standing on the rail road track where the neighborhood road crosses it, and the others were standing near the intersection of the two roads. From that point to the place where the horses were visible by the cars coming from Brandon, it was not less than two hundred yards, and probably more; and from the same point to the culvert, where the collision took place, it was a further distance of about one hundred and forty yards, the track being, for this latter distance, thickly set on both sides with bushes, and being on an embankment four or five feet in height. On the morning of the occurrence, the cars were running with

unusual rapidity, such as had never been seen before by a witness who lived near the road. This witness was in full view of the cars and of the animals when the locomotive came within sight of the animals. The whistle was sounded before reaching the place of intersection where they were standing, but there was no change of speed perceived, nor any effort to stop the locomotive by applying the *brake* or reversing the engine. When the locomotive approached within about one hundred yards of the place where the animals were standing, they turned and ran down the track until they reached the culvert, and being unable to go further or to escape from the track, they were there overtaken by the locomotive and mangled and killed, and the locomotive thrown from the track down the embankment a distance of some thirty or forty feet.

The train at the time consisted of the locomotive and tender, a negro car, a passenger car and five freight cars, and the persons in charge of it were the engineer, the conductor, and a negro fireman. There was a grade on the track from the culvert to the point where the horses were first visible to the engineer at the rate of twenty four feet to the mile by measurement, and a moderate curve in the track.

It was proved by an experienced engineer, that the engine used on this road at the time, was in good condition—that such an engine when running at the speed of twenty miles an hour, can be stopped in six hundred feet, by applying the *brakes*, which should be in the front and rear of every car and worked by competent hands, and by reversing the engine in due time, and if there be sand boxes, to scatter sand upon the track, which are necessary in case it should be wet. He was of opinion that the engine could not have been stopped in six hundred feet upon this road, from his knowledge of its condition, and the train usually attached to it—that if it was wet at the time, the difficulty of stopping would have been thereby increased—but that if every thing had been in perfect order, six hundred feet is a sufficient distance for stopping the engine—that nine hundred feet would be necessary if the track was wet and there was a grade of even two feet—that *brakes*, with a sufficient number of brakemen, and sand boxes filled with dry sand are essential to the management of the train with safety.

There was testimony showing that there was much grass on the track at the time, and also testimony to the contrary; and it was shown, that with the track in that condition, it would have been difficult to stop the locomotive, and, if the track was in that state, that it was in a very bad condition.

There was also some testimony showing that the track was wet at the time; but there is a clear preponderance of evidence

to show, to the contrary, that the weather was clear, hot and dry, and that there was no dew on the track, at the time.

As to the character of the engineer, the testimony is conflicting. But while there is testimony to show that he was attentive and competent, the weight of evidence tends to show that he was not a careful and prudent man—that he was addicted to dissipation and drunkenness, and sometimes not sober when in the discharge of his duties as engineer—that he had often to be awoke in the morning for the cars, after he had been drinking—that there was a constant sounding of the whistle on the morning of this occurrence, and before reaching the point where the animals were found, insomuch as to attract the observation of the neighbors at the unusual rapidity and noise of the cars, and that the engineer was in the habit of sounding the whistle when there were no cattle on the track, and when there was no occasion for it, and wantonly.

It was in proof by a witness, who was on the locomotive with the engineer at the time, that the engineer had been drinking liquor that morning enough to feel it, but was not drunk, but lively—that when they first saw the animals, which was at a distance of about two hundred yards from the place where they were crossing the road, this witness remarked to the engineer that there was danger, and that he replied, he did not care—let them get out of the way—that he did nothing to stop the train until the locomotive struck the first of the animals, and then the fireman sprang to the *brake* and witness helped him, but with no effect—that about that time, the engineer reversed the engine—that no order was given to apply the *brake*, the fireman acting of his own accord, and the witness, to save himself.

The testimony of this witness is impeached by the production of a letter testified by a witness to have been written, at his instance shortly after the occurrence, to the president of the railroad company, exculpating the engineer from all blame; which letter he denied in his deposition that he ever wrote or authorized to be written. But in many material respects his testimony was sustained by the other witness, and the question of credibility was one which the jury had the right to determine, under all the circumstances.

It was further proved that the conductor, a lad of about seventeen years of age, was in the passenger car when the collision took place, and had been there for some time, reading a magazine or something of that kind, and paying no attention to the progress of the train, and that he knew nothing of the danger until he heard the sound of the whistle, when he looked out and saw the animals running—he sat down immediately and felt a sudden motion like that caused by reversing the engine. He

then got out of the car, and found that the engine had run off the track, the negro car across the track, and the passenger car thrown nearly off the track, the animals lying dead or wounded upon the track. This witness proved that the cars started behind their usual time that morning from Brandon, and were running at the rate of eighteen or twenty miles an hour when the collision occurred.

It was further proved in behalf of the railroad company, by a witness, who was not an engineer, but had been Superintendent of this railroad for many years, that he was at the place on the day after the occurrence, and was of opinion that if the engine was moving at its usual speed, and there was dew and grass on the track, it could not have been stopped at the point where the accident occurred in less than one thousand to fifteen hundred feet with every appliance—that there was a curve and a grade descending towards the culvert from Brandon of thirty-two feet to the mile as he judged by his eye—that there was much grass on the track, and he considered the road, and cars, and locomotive in good condition—that the grass would cause the wheels to slide and render it difficult to stop the cars.

There was not more than one *brake* to the train, and no brakeman, and no sand-boxes, and the track was not fenced in or enclosed.

This appears to be the substance of the evidence, and it is here stated so much at length in order that some of the questions presented in the case and depending upon it, may be properly apprehended.

The value of the property destroyed or injured was proved to be \$550 or \$600, and some further damage is shown to have resulted from the injury. The jury found a verdict of \$1,211 90, which exceeded the value of the property and actual damage proved—and the defendant below moved for a new trial, 1st, Because the verdict was contrary to law and evidence; and, 2d, Because the damages were excessive. This motion was overruled, and the case is brought here for alleged error in that, and in the ruling of the Court upon the trial, to which exceptions were taken.

Several questions of great importance, and of the gravest public interest are here presented for the first time for the determination of this court. Fortunately these questions, though new in this court, have engaged the attention of the most learned courts in this country and in England; and in the consideration of them, in addition to the aid of the able arguments of the counsel for the respective parties, we have had the benefit of numerous adjudications of other judicial tribunals involving the same or similar questions. By such aids we are enabled to come

to conclusions satisfactory to our minds upon a subject of such profound importance, in its direct and collateral bearings, and will proceed to state the views we take of the various questions presented for decision.

It is insisted in behalf of the railroad company that, by their charter, they had the absolute and exclusive right to the land covered by their track, with the privilege of running their engines and cars at whatever times and at whatever speed they saw proper without obstruction—that they were not required by their charter nor by any other law, to fence their track—that the exclusive property in it being in the company, it was a wrong on the part of the owner of these animals to suffer them to be upon the track—that it was his duty to keep them under his own enclosure or upon his own premises, and that if injury occurred to them in consequence of being suffered to go at large, and where they might be upon the railroad track, and thereby interfere with the legal and proper business of the railroad, it was by the plaintiff's own wrong, for which he is entitled to no redress—that being on the road wrongfully and in derogation of the lawful business of the company, they were not bound to pay any attention to them and might lawfully run their engines and cars in their proper business without regard to them, and without responsibility for their destruction.

The first point of inquiry, therefore, is, what are the rights and duties of the railroad company in the use of their road, with reference to the rights of others.

It is certainly true that they have the absolute and exclusive right to run their engines and cars upon their track in furtherance of the object of their charter, without interference by others; and that no one else has any right whatever to the use or occupancy of the track. But this right is to be exercised in subordination to the general laws and policy of the State, unless when the company is, expressly or by necessary implication, excepted from their operation. And while their duties to those immediately connected with them in the objects of their business are faithfully to be performed, the rights of others collaterally interested in their operations are not to be disregarded. The highest of these duties is that which arises from a proper regard for the safety of *persons* who entrust their lives to the care and skill which is bound to be employed in the use of vehicles of so much hazard and danger. In this respect, the law imposes upon such companies the greatest strictness in providing all things necessary to the safety of passengers, which care, skill and foresight require, and that their agents should be faithful and vigilant, and in all respects competent and trustworthy of the great responsibilities committed to them. Without an im-

plied guaranty by such companies for fidelity in these respects, the dangerous power given to them could never have been granted.

The relations of the company with other persons, growing out of the use of their franchise, are also governed by the general rules of law, from which, for the most part, they are not exempted by their charter. Their right of exclusive use and enjoyment of the track, confers no power to violate the rights of others with which the exercise of their right may come in conflict, but *must be exercised so as not to injure the rights of others*. It is no greater than the owner of the fee simple had before it was acquired by the company; and if such owner had no right, in carrying on his lawful business upon his own unenclosed land, to destroy his neighbors' beasts found upon it, neither could this company, in conducting their business, justifiably destroy such animals, unless the act was unavoidable, after the exercise of all due skill, prudence and care by the company and its agents. For the rights and powers of the original proprietor with regard to the land were at least as high as the railroad company, and the rights of the owner of the animals, whatever they were, were as much under the protection of the law as those of the company. The idea is wholly inadmissible, that in giving the company the use of the land covered by the track for the purpose of running their engines and cars, it was intended to confer upon the corporation privileges and immunities in the land which the original owner, who had the full and absolute dominion over the same property to all intents and purposes, did not possess; and it is manifest that, no immunity being provided in their charter, they hold the land subject to the laws and general policy of the State, with no power, as to dominion over it, superior to that of the original proprietor.

Let us, then, test the rights and duties of the parties to this controversy by the same rules of law, applicable to the relations of the proprietor of the land before it was granted to this company, and the owner of the animals, the subject of this suit.

Suppose such proprietor, not having enclosed his land, had upon it, works in which dangerous machinery was lawfully employed in carrying on his lawful business; or suppose he had had a railroad upon it and in full operation, performing all the business of such a work for his own individual benefit and profit, but with no safeguards to protect his works against injury from the cattle of his neighbors; what is the rule by which, under such circumstances, he must be governed in the use of his property in the way he had seen proper to use it, with reference to the encroachments of his neighbors' beasts upon his land and their interference with his business? It is clear that there was no right in his neighbors to permit their cattle to encroach upon

his property. But if they had a right to suffer their cattle to go at large in a neighboring range or common pasture, ordinary prudence would dictate that the proprietor of the land and works should take proper means, by fences or otherwise, to prevent intrusions which would in all probability be made by them upon his property and to the injury of his business; and if he omitted to do so, and without such precautions, continued to pursue his business and use his property regardless of the fact that the cattle were in the way, and, without the necessary care and prudence to avoid injury to them at the time, the cattle should be destroyed, he would be responsible, unless under our laws the cattle would be trespassers and liable to be distrained *damage feasant*.

The question, then, is whether by our laws and policy, a man is compelled to keep up his cattle so as to prevent depredations upon his neighbors' unfenced and unenclosed premises; or whether a man is not justified in suffering his cattle to go at large in the range or common pasture without liability to those on whose premises, not being lawfully fenced, they may go; and whether it is not required that the owner of lands, before he can justify an injury done to his neighbor's beasts, which have come upon his lands, must not show that the trespass was done notwithstanding he had such a fence as is required by law or that the injury was unavoidable and such as could not have been prevented by due care and prudence.

It is urged in behalf of the railroad company, that by the rule of the common law, the owner of cattle was bound to keep them within his own enclosure—that the owner of lands was not required to guard against this intrusion upon his premises, but that the owner of cattle was bound to prevent them from entering upon the premises of others, whether fenced or not—that this rule of the common law prevails here, and that it is unlawful to permit cattle to graze in a neighboring range or common unenclosed pasture, from which they may go upon the premises of individuals to their injury; and consequently, that the act of the plaintiff in permitting his animals to go at large being unlawful, he is not entitled to any redress for their loss which resulted from his own wrong.

These positions are sustained by decisions of the Supreme Courts of New York, Vermont, Pennsylvania and Michigan, founded on the reason, that the rule of the common law prevailed in those States which compelled persons to keep their cattle off their neighbors' lands, and holding that that principle is applicable to cattle suffered to go at large and found upon railroad tracks, when they were destroyed. On the contrary, a different rule is held in Connecticut, Indiana, Ohio, South Carolina and

Alabama—*Stadwell v. Ritch*, 14 Conn. 293; *Suley v. Peters*, 5 Gillman 130; *Kerwhaker v. Cleveland R. R. Co.*, 3 Ohio State Rep. 172; *Fripp v. Haull & al.*, 1 Strob. Law Rep. 176; *Nash. & Chat. R. R. v. Peacock*, 25 Ala. 232; and the rule of the common law is held not to prevail, because it is inapplicable to the condition and circumstances of the people of those States and repugnant to the custom and understanding of the people, from their first settlement down to the present time.

It cannot be denied that the common law of England is the law of this State so far as it is adapted to our institutions and the circumstances of the people, and is not repealed by statutes or varied by usages which by long custom have superseded it; and that when the reason of it ceases, the rule itself is inapplicable. In a densely populated country like England, with small farms and but few cattle, the reason of the rule that every man shall prevent his cattle from going at large, is apparent; and the rule prevails because it is suited to the condition of that country. The policy of the common law there, was that it was more convenient that a man should be bound to *fence his cattle in*, than that he should *fence his neighbors' out*. The same reason may render it applicable in any of the States of this Union, and in those where this rule has been held to prevail.

But the circumstances of our people are widely different from those of such communities. The State is comparatively new and, for the most part, sparsely populated, with large bodies of wood-lands and prairies which have never been enclosed, lying in the neighborhoods of the plantations of our citizens, and which by common consent, have been understood from the early settlement of the State, to be a common of pasture, or in the phrase of the people, the "*range*," to which large numbers of cattle, hogs and other animals in the neighborhood, not of a dangerous and unlawful character, have been permitted to resort. These large numbers of cattle and other animals are necessary to the wants and business of the people, whose great interest is in agriculture; and the large and extensive tracts of land suitable for the pasture of stock, are most generally not required by the owner for his exclusive use. If so required, no one questions his right to fence them in and to appropriate them accordingly. But until he does so, by the universal understanding and usage of the people, they are regarded as commons of pasture for the range of cattle and other stock of the neighborhood.

This policy is sanctioned by strong reasons of public convenience growing out of the condition of the people. The greater part of the lands of the State have been comparatively but recently brought into cultivation. When purchased and taken possession of by their owners they were wild. The timber had

to be cleared, buildings erected, and as much land as could be, brought into speedy cultivation. The settler had but little time to enclose his lands, and, therefore, he made enclosures only as his necessities and convenience required. He turned his cattle into the range, because it was more convenient to do so than to build fences and keep them within his own enclosures. His neighbors did the same thing, and the practice became general; and thus the usage has established the general rule among the people, that *it is more convenient to make fences to keep the cattle of others out of lands not intended to be used for pasture, than to fence their own cattle within their enclosures.* And by this custom a large amount of pasture which would otherwise be lost, becomes useful and valuable in rearing great numbers of cattle and stock of various kinds, contributing greatly to the convenience and emolument of our people. It is also highly convenient in rendering a man safe in pasturing his own cattle in his own unenclosed lands, which he could not do with safety, if the common law prevailed; because his cattle, when pasturing upon his own unfenced lands, would be liable to intrude upon his neighbor and subject to the common law rule arising from the trespass. He would, therefore, be compelled to enclose his own pasture lands before he could safely use them as such; and such a necessity in the condition of the lands of this State, would be a great public grievance.

For these considerations, the custom has grown up among the people and is well settled by universal acceptance, that a man is entitled to permit his cattle and other stock to go at large in the neighborhood range, and is not liable as a trespasser for the damage done by them to the premises of his neighbor which are not enclosed by a lawful fence. This being the condition of the people from the first settlement of the State, and the same reasons of convenience still prevailing, it is manifest that the rule of the common law is wholly unsuited to our circumstances, and upon well settled doctrine, cannot be held to be applicable here.

If there could be a reasonable doubt upon this point, it must be removed by the provisions of our statutes. These provisions are utterly irreconcilable with the rule of the common law, and are made with reference to the contrary policy which has existed here.

The twelfth section of the Act of 1822, Hutch. Code 276, which was a re-enactment of an act passed in the early history of the State, provides that "it shall not be lawful for any person to drive any horses, mules, cattle, hogs or sheep *from the range to which the same may belong.*" The next section provides penalties for the violation of that provision. The 14th section prohibits animals of a particular character from being suffered

to run at large in the woods or in any enclosed range. Other sections make it the duty of each owner of horses or other stock to have a brand and ear mark, and to have the same recorded; the object of which was that the stock of each owner in the range might be known and designated. And the 17th section prohibits the owner from sending or permitting any slave or Indian to go "*into any of the woods or ranges of this State,*" to mark or brand any cattle, &c.

These provisions clearly recognize the right of any owner of horses, cattle or other stock, to put them in the *range*, which means the unfenced wood lands or other pasture lands in the neighborhood.

Again—the act of 1822, Hutch. 278, 279, which is a transcript of the Territorial Act of 1807, provides that "if any horses, &c., shall break into any grounds enclosed with a strong and sound fence, five feet high, well staked and ridered or sufficiently locked, and so close that the beasts breaking into the same could not break through, *which shall be deemed a lawful fence,*" the owner shall be liable to the party injured for damages. This provision is altogether useless, if the owner was bound to keep his cattle within his own enclosure; for by that rule he was liable for damages to the party injured by the trespass of his cattle whether his premises were fenced or not. But it is plain that it was the object of this statute to change the rule of the common law and to provide that the party whose cattle should intrude upon the premises of another should not be liable for damages unless the party injured kept a lawful fence. This intention clearly appears from the third section of the same act, which prohibits "*any person injured for want of such sufficient fence,*" under a heavy penalty, from wounding or killing any horses, mules or other stock trespassing upon such premises.

The policy upon which these enactments are founded, and the acts themselves, clearly establish two principles—first, *that the owner of cattle may rightfully suffer them to go at large for pasture upon the neighboring range*; and secondly, *that the owner of lands is bound to keep them fenced with a lawful fence, if he would prevent the intrusion of cattle upon them, and otherwise that he cannot complain that the intrusion is unlawful.* And it has been held by this Court, that under these provisions, when cattle break through an insufficient fence into the premises of a party, he has no right of action for damages, and cannot distrain *damage faisant*, which were clear rights at the common law—thus conclusively settling that the rules of the common law are not in force here. *Dickson vs. Parker*, 3 How. 220.

It is to be observed that the cases above adverted to, holding

that cattle found upon a railroad track may lawfully be destroyed, in the prosecution of the business of the company, are founded upon the reason that the owner was compelled by the rule of the common law to keep them up, and that it was by the violation of that common law duty that the cattle were at large and upon the railroad; and, therefore, that the owner, having been guilty of a wrong, is entitled to no redress against the company. Having shown that this rule of the common law does not prevail here, the argument founded upon it fails; and the conclusion follows, that the plaintiff cannot be considered as a wrong-doer in suffering his animals to go at large for pasture, and that the animals were not unlawfully on the railroad track so as to justify the company in destroying them, without using all due care, prudence and skill to avoid their destruction.

But it is contended that the railroad company, having the exclusive use of their track, the plaintiff's cattle were improperly there, interfering with the lawful business of the company to the hazard of the lives of their passengers, and impeding the speed which, from the very nature of their business, they were authorized to use in running their engines upon the track, and, therefore, that the injury was done without wrong on the part of the company.

This position is met with so much clearness and force by the Supreme Court of Ohio, in the case above cited, as to justify our adoption of the views of the subject there taken. The court say—"The defendant's right to the exclusive and unmolested use of its railroad track, is undeniable. And it must be conceded that the plaintiff had no *right* to have his hogs on the track and that they were there improperly. But how came they there? If the plaintiff had placed them there, or knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation. But it would appear that, in the exercise of the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally and without his knowledge, wandered upon the railroad track. The right of the defendant to the free, exclusive and unmolested use of its railroad is nothing more than the right of every other proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and indeed the duty, of the agents of the company to drive them off, but not to injure or destroy them by unnecessary violence. The owner of a freehold estate in lands, enclosed by a lawful fence, has the right to expel trespassing animals which have broken through his enclosure; but in doing

so, he would become liable in damages to the owner of the animals, if they be injured by use of unnecessary and improper means, although the latter would be bound to make reparation for the injury done to the former, by the trespassing animals. It is not pretended that the railroad of the defendant was under enclosure through which the plaintiff's creatures had broken. It is true, that there is no law here *requiring* railroad companies to fence their roads. But when they leave their roads open and unfenced, they take risk of intrusion from animals running at large, as do other proprietors who leave their lands unenclosed. If a farmer undertake to cultivate his ground in corn, he would doubtless be troubled by the destructive intrusions of cattle running at large; but without a sufficient fence, he could not maintain an action against the owner of the animal for trespass. The defendant constructed its railroad with a knowledge that it was the common custom of the country to allow domestic animals to run at large upon the unenclosed grounds of the neighborhood; and without the precaution of enclosing its railroad, the company could not sustain an action against the owner of such animals at large as might happen to wander upon the track of the road. The owner of the animals, in allowing them to run at large, takes the risk of the loss or injury to them by unavoidable accident; and the company, in leaving its road unprotected by enclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner."

It is a sound and reverend maxim of the law that though a man may do a lawful thing, yet if damage thereby befall another, he shall be answerable for it, if he could have avoided it.—*Broom's Legal Maxims*, 275; *Aldridge v. Great Western R. R. Co.* 4 Scott, N. R. 156. This principle is entirely at war with the doctrine apparently sanctioned by some of the cases cited by the plaintiff in error, that the nature of their business required them to use great speed, therefore that they were justified in running their engines regardless of the cattle upon the road, with whatever speed they might think fit, without liability to the owner of the cattle thereby destroyed. Such a doctrine is unfounded in sound law, and would be dangerous and mischievous in the extreme both to the lives of passengers of the company and to persons whose rights may be collaterally involved in their operations. For such a rule, while it would give to conductors and engineers upon such roads, a free license wantonly to destroy cattle which might casually be upon the track and in any way impede their progress, would greatly endanger the safety of travellers on the road, by subjecting their lives to the capricious exercise of this liberty to the agents of such companies. These mischiefs would almost necessarily result from such a principle

if sanctioned; and the consequence would be, that all confidence in such works would be destroyed; and, instead of being sources of public convenience, as they would be under the salutary restraints of law which bind the citizen, they would be converted into instruments of private oppression and public calamity.

Again—it is said that the destruction of the plaintiff's animals was in consequence of his suffering them to be in a situation exposed to destruction; and of which he was bound to take notice; and that the rule is that when the injury has resulted from the fault or negligence of the plaintiff, or from the fault or negligence of both parties, without any intentional wrong on the part of the defendant, there can be no recovery.

It is above shown that it was not unlawful in the plaintiff to suffer his animals to go at large in the neighborhood of the railroad, and as that was the remote cause of the injury, it cannot be said to be a wrong or gross negligence. It is true, the highest degree of prudence might have induced him not to suffer his cattle to be at large near the track and exposed to its dangers. But was he bound to use such precaution? He is presumed to have acted with a knowledge of the relative legal rights and liabilities of himself and the company. In suffering his cattle to range, exposed to the dangers of the railroad, he subjected himself to the hazard of all that the company might legally do in destroying them, but to nothing further. And they were justified in destroying them only in the necessary prosecution of their business and when the act should become unavoidable, after the exercise of such care, prudence and skill as a discreet man would use to prevent it. He had a right to act, and must be presumed to have acted, on this rule; and if he suffered by it, but without any violation of it by the company, he would be without redress. But he was not bound to lose his right to range his cattle near the railroad, and keep them enclosed, upon the assumption that they would be illegally destroyed by the company, if suffered to go at large near the road. He had as high a right to range his cattle in the neighborhood of the road as the company had to run its engines and cars along their track—a right prior in time to that of the company, and one equally entitled to be noticed and respected by the company. If the plaintiff was bound to respect their right to run their cars and engines by keeping his cattle enclosed in order to prevent their exposure to the dangers of the road and damage to the company by parity of reason, was it not the duty of the company to respect his prior right of range by keeping fences to protect their road from incursions of his cattle and to save him from injury by their destruction. The road was under no legal obligation to fence its track, nor was the plaintiff bound by law to keep his animals

enclosed, in order to prevent their exposure to the dangers of the road; and so far the legal obligations are equal. But the same rule of prudence that would require the plaintiff to enclose his cattle in order to avoid the danger of destruction by the railroad, would also demand of the company, as a matter of protection to its property and safety to the lives of its passengers, to fence its track. If there is any difference in the degrees of duty, it would appear that the latter was much the higher and more imperative, and the delinquency on the part of the company in neglecting it, would, of course, be greater.

It is, therefore, manifest, that the injury cannot be ascribed to the fault or negligence of the plaintiff, in which the defendant is not inculpated. And the most favorable point of view in which it can be regarded for the defendant is, that both parties were mutually in fault, and both the immediate cause of the injury. In such a case, unless the injury be malicious and wanton, the party injured cannot maintain an action, because the injury has been caused by his own wrong.

But this rule is subject to several qualifications which render it inapplicable to the facts of this case.

1st. It does not apply where the party committing the injury might have avoided it by the use of common and ordinary caution; and this is the rule even where the remote cause of the injury is the *unlawful act* of the party complaining. This is held by numerous authorities. In the *Mayor of Colchester vs. Brook*, 53 Eng. Com. L. Rep. 376, the plaintiff had deposited and kept a bed of oysters in the channel of a navigable stream, thereby erecting a public nuisance, yet the defendant was held liable for running his vessel upon the bed of oysters, greatly injuring them, there being room to pass in the stream without it, because the injury could have been avoided by the use of reasonable care and diligence. In *Bird v. Holbrook*, 15 Eng. C. L. Rep. 91, the defendant had set a spring gun upon his walled garden, to protect his property from being stolen, and the plaintiff, in climbing over the wall in pursuit of a stray fowl, was shot by the gun; it was held that the plaintiff was entitled to recover damages, although he brought the injury upon himself by a trespass upon the defendant's enclosure. In the case of *Deane v. Clayton*, 2 Eng. C. L. Rep. 183, it is said "that you shall *do no more than the necessity of the case requires*, when the excess may be in any way injurious to another; is a principle which pervades every part of the law of England, criminal as well as civil, and belongs to all law that is founded on reason and natural equity. The same rule is held in *Lynch v. Nurdin*, 41 Eng. C. L. R. 422; *Butterfield v. Forester*, 11 East 58; *Vere v. Lord Cawdor* id. 567; *Vaughan v. Menlove*, 32 E. C. L. R. 211;

New Haven S. & T. Co. v. Vanderbilt, 16 Conn. Rep. 421; Bees v. Hous. R. R. Co., 19 Conn. 566, and is involved in Parker v. Dickson, 3 How. 219.

Another qualification to the general rule that there is no liability upon the defendant when the plaintiff has contributed to the injury, exists when, though both parties are in fault, the defendant has been the *immediate* and *proximate* cause of the injury. This is well settled by authority.—Davies v. Mann, 10 Mees. & Wils. 545; Trow v. Vermont Cent. R. R. Co. 24 Vermont Rep. 494, and cases there cited, 3 Ohio State Rep. 194, Broom's Leg. Max. 283.

It may, therefore, be considered as settled law, that though there be negligence or fault on the part of the plaintiff remotely connected with the injury, yet, if at the time the injury was done, it might have been avoided by the exercise of reasonable care, prudence and skill on the part of the defendant, the plaintiff may maintain his action for the injury.

It follows from these views of the case, that the instructions granted on the trial in behalf of the plaintiff were correct: and that the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 10th, 14th and 16th instructions in behalf of the defendant were erroneously granted, and the 13th instruction is questionable. And though the verdict was contrary to the instructions given in behalf of the defendant, it should not for that reason be set aside, because these instructions were erroneous and should not have been given.

We will next consider the objections taken to the admissibility of certain evidence in behalf of the plaintiff. This testimony tended to show that the engineer on duty at the time the injury was done, had previously been in the habit of sounding the whistle when there was no occasion for it, to frighten animals and annoy the neighbors on the road. There was testimony showing him to be a man of dissipated habits; and the object of the testimony objected to, with other evidence to the same point not objected to, was to show his character to be that of a reckless and untrustworthy agent. It is not denied that it was competent to show the character of the agent and his unfitness for the responsible trust reposed in him. It is the imperative duty of such companies to provide skillful, competent and trustworthy agents, and they are responsible upon their failure to do so for the consequences of their neglect of duty.—Stokes v. Saltonstall, 18 Peters 181; 14 How. 468. Upon a question involving his character and fitness for his trust, and the consequent responsibility of the company for his delinquency in these respects, it is not only competent but necessary to enquire into his previous habits and conduct in order to show that the alleged misconduct at the time of the injury was in keeping with his general char-

acter. Frequently it may be out of the power of a party to show positively the reasons of the particular delinquency of such an agent, and in such cases it is proper and necessary to show his general character in order to explain his conduct at the time.

The counsel for the plaintiff in error place this objection on the ground that this testimony tended to create a prejudice against the company, and thereby increase the damage. This may be true; but it does not appear to have been offered for that purpose; but if the testimony was competent to show that the company employed a reckless and incompetent engineer, as it clearly was, that being a material point involved in the suit, it cannot be said that it should have been excluded. Being competent upon the issue, it is not to be presumed that it was perverted to an improper purpose before the jury.

The last objection urged against the judgment is that the damages assessed by the jury were excessive. The amount of the verdict considerably exceeded the value of the animals actually proved, though there was evidence which might have justified the jury in somewhat exceeding that value. But it is plain that the jury gave exemplary damages in some amount; and the question is whether the case justified a verdict of that character.

The evidence was sufficient to justify the jury in believing that the railroad track was in an improper condition and unfit for the exigencies that may often arise in running engines of so much danger, being covered with grass so as to prevent their prompt stoppage when necessary—that the cars were not supplied with the *brakes* and fixtures necessary to their safe running and speedy stoppage; and the injury here complained of is excused on these grounds—that the conductor was a lad of seventeen years of age, and giving no attention to his duties when the collision took place—that the engineer was a man of intemperate habits, reckless and unfit for the responsible trust confided to him—that either by his wanton conduct or by the bad condition in which the cars were furnished with the necessary appliances for prompt stopping, (either or both of which the jury had the right to believe from the evidence,) the locomotive was not stopped as it could and ought to have been on a properly fitted and well conducted railroad—that no proper exertion was made to stop the locomotive in time to avoid the injury, and that the engineer appeared reckless of the destruction of the stock. No fault is imputed to the plaintiff, except that he did not keep his stock from the track where they casually were, without his knowledge.

Upon the evidence conducing to show this state of things, the Court, by the consent of both parties, instructed the jury as follows:

“Every man in the management of his own affairs shall so

conduct them as not to injure others; this duty was a mutual one, binding alike on the plaintiff and defendants; and if the plaintiff has failed to observe this duty, and the defendants are guilty of a like breach, the plaintiff has no right to complain and cannot recover, unless, notwithstanding the conduct of the plaintiff, the injury would not have happened had it not been for the wanton and wilful negligence and misconduct of the defendants."

The question of gross negligence and wanton misconduct was thus fully presented for the consideration of the jury.

Let us see what are the rules of law governing the conduct of the defendants in the prosecution of this business.

In the first place, the company is responsible for the tortuous acts of its agent, whether the act was one of omission or commission, whether negligent, fraudulent or deceitful.—*Philadelphia & Reading Railroad Company v. Duby*, 14 How. 486, and the same doctrine is held by the same court in *Stokes v. Saltonstall*, 13 Peters, and is applied to an incompetent or careless agent.—*Railroad Co. v. Keary*, 3 Ohio 206.

In the case first cited, the Supreme Court of the United States say in a case involving the liability of a railroad for an injury by the neglect of their agent—"Where carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration of such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases, may well deserve the epithet of *gross*," 14 How. 486. And again—"Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior can insure safety to life and property. The entrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders, is itself an act of negligence, the '*causa causans*' of the mischief. * * * * * Any relaxation of the stringent policy and principles of the law affecting such cases, would be highly detrimental to the public safety."—*Id.* 487.

Again—it was the duty of the company to provide engines properly constructed and in good order, with suitable fixtures for preventing injuries likely to occur from the nature of their business; and to use "such care and diligence in using the locomotive upon the road as would be exercised by a skillful, prudent and discreet person, having a proper desire to avoid injury to property along the road."—*Balt. & Susq. R. R. Co. v. Wood-*

ruff, 4 Maryland Rep. 257—to provide a safe track, a safe engine and cars, and a suitable number of competent and faithful men to carry on the work.—Hegeman v. West R. R. Co., 16 Barb. 356, 2 Denio 441, 3 Ohio Rep. 306, 2 Cushing 540.

Again—it is a well settled rule of law and highly applicable to engines and locomotives on railroads, that persons having charge of instruments of great danger are bound to manage them *with the utmost care*.—Dixon v. Bell, 5 M. & S. 198; Lynch v. Nurdin, 41 Eng. C. L. R. 422. It is well said by the Supreme Court of Ohio, that “no one has the right to put in operation forces calculated to endanger life and property, without placing them under the control of a competent and ever active superintending intelligence. Whether he undertakes it or procures another to represent him, the obligation remains the same, and a failure to comply with it in either case, impose the duty of making reparation for any injury that may ensue.”—3 Ohio State Rep. 209.

And in this, as in all other cases of agency, the rule is that “*the principal holds out his agent as competent and fit to be trusted, and thereby he, in effect, warrants his fidelity and good conduct, in all matters within the scope of the agency.*”—Story on Agency, 352.

The question of gross negligence or wanton mischief was distinctly submitted to the jury, and was a material part of the case, and whether we consider it with respect to the bad condition of the track and the absence of appliances and fence necessary for its safe operation, or the unfitness and recklessness of the engineer, it is plain that the jury were at liberty from the evidence to find that the injury was occasioned by the gross neglect of the company or the wanton mischief of the engineer. That was a question which they had the right to determine, and their verdict cannot be disturbed on that ground when the evidence conduces to support it in any fair view in which it can be taken, especially when the testimony is conflicting and the credit of witnesses is involved. Under such circumstances their finding settles the fact.—14 How. 486; Lynch v. Nurdin, 41 Eng. C. L. R. 426; Bees v. Housatonic R. R. Co., 19 Conn. 561. Lord Denman says in Lynch v. Nurdin, “it is a matter strictly within the province of a jury deciding on the circumstances of each case.”

And it is immaterial whether the jury thought there was gross neglect or wilful mischief. The rules above stated apply equally to either state of the case, and would warrant the jury in finding exemplary damages if the circumstances of neglect or aggravation tended to justify it, and they thought fit to award it. In the last case cited, Lord Denman says: “Between wilful mis-

chief and gross negligence the boundary line is hard to trace; I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice."—*Lynch v. Nurdin*. And upon the same principle, the numerous cases, whether of gross negligence or wanton wrong, have proceeded in which exemplary damages have been awarded. For it matters but little to a party injured, whether the wrong be done with a malicious intent or by gross violation or neglect of duty.

It must be taken, then, that the verdict of the jury settles the question that there were circumstances of aggravation tending to show gross negligence or a wanton and reckless disposition to injure or destroy the plaintiff's property. And it is well settled that if the property was destroyed under such circumstances, exemplary damages may be awarded.—*Sedgwick on Dam's*. 42 & seq. ib. 488, 489; 3 *Graham & Wat. on New Trials*, 1121 & seq., and cases there cited. And the damages allowed in this case do not appear to be enormous.

Upon a careful consideration of the whole case, in view of its great importance to the community, we are of opinion that the judgment is correct; and it is accordingly affirmed.

A re-argument was asked for upon so much of the foregoing opinion as relates to exemplary damages, but it was denied.

FALSE RETURN. ONUS PROBANDI.

Nuckols, &c. v. Lundy, &c.

Circuit Court of Grayson County, Virginia. October Term, 1858.

The specific fine of \$100, imposed by statute upon an officer for making a *false return* upon process, does not affect the right of action of the party injured. It is only an additional penalty.

The *onus* of proving the falsehood of an officer's return lies upon the party alleging the falsehood. In a suit against the officer the return will be taken to be *prima facie* true.

Answers to interrogatories, propounded under the statute, can only be read by the party propounding the interrogatories: the party answering not being entitled to read his answers.

This was an action of debt in the circuit court of *Grayson*, upon a constable's bond. The declaration set out the bond and condition, and assigned three breaches:

1st. That the relators, *Nuckolls & Dickenson*, placed in the hands of the defendant, *Lundy*, who was a constable, in December 1854, three executions against the effects of *John Lundy*, amounting in the aggregate to upwards of \$100: that the said constable failed to levy and collect the amount of those executions, as he should and could have done, and returned them to the clerk's office, with a return endorsed upon each of them in these words: "Held up by order of *Creed Nuckolls*," which returns were false—whereby the relators lost their said debts.

2d. That the said relators placed in the hands of said constable, sundry executions against the effects of *John Lundy*: that the defendant failed to levy the executions, though *John Lundy* had sufficient effects to satisfy them, and thereby the debts were lost.

3d. That the relators placed in the hands of said defendant, sundry other executions against the effects of *John Lundy*: which executions the defendant levied, and made the money, but failed and refused to pay it to the relators.

To the first assignment the defendants demurred, and to the whole declaration they pleaded "*conditions performed*" and "*non damnificatus*."

A. M. Davis, for plaintiffs.

W. H. Cook, for defendants.

The case being called at this term, *Cook*, in support of the demurrer, to the first count, submitted that, by the 29th sec. of chap. 49, p. 251, of the Code, a specific fine of \$100 is imposed upon an officer for making a *false return*. This fine enures to the *Commonwealth*, and can only be recovered by indictment, information, or motion in behalf of the *Commonwealth*. It is submitted that this provision excludes any right of action in behalf of an individual. It cannot have been intended to subject the officer to this heavy liability, (a liability in this case amounting to \$300, there being three executions charged to be falsely returned;) and yet leave him exposed to a private action also. Where the Legislature intended to reserve the right of action to the party injured, it has taken care to do so. In the next section provision is made for proceedings by the party injured, in case of a continued *failure to return*; yet no provision is made for proceeding in case of a *false return*. *Expressio unius est negatio alterius*.

Davis was heard in reply, and contended that the proceeding for a fine did not destroy the right of action, but was a penalty, cumulative to the damages which the injured party was entitled to recover.

FULTON, J.

The effect of the statute imposing fines upon officers for failing to return process, or for making false returns, has, of late, undergone a great deal of consideration, and I confess that I have been led to conclusions which at one time I did not think well founded. It seems now to be conceded that these fines are payable to the Commonwealth, and are to be recovered only by proceedings in the name of the Commonwealth. But I do not think that they prevent the party injured, by the false returns, from prosecuting his suit to recover damages for the injury he has suffered from that return. In many other instances the liability to prosecution at the instance of the Commonwealth, co-exists with a right of action on the part of the person injured. Indeed, now, we may consider this as a universal rule, for the doctrine of *merger* in cases of felony is overthrown by statute. I must overrule the demurrer.

A jury being empanelled, the plaintiffs proved that in Dec'r 1854, they placed in *Lundy's* hands, for collection, five claims on *John Lundy*, amounting to about \$125. Judgments and executions were obtained on all the claims. Two of them, amounting to about \$15, were returned "*satisfied*," and the defendant admitted that he was bound for that amount. The other three were returned, "Held up by order of *Creed Nuckolls*"—(*C. N.* was one of the relators.) The plaintiffs also introduced evidence tending to show that *John Lundy* had effects subject to the executions, and endeavored to prove that the defendant could have made the debts. The defendant introduced evidence which clearly showed that *John Lundy* was insolvent when the executions of the relators issued. He exhibited more than a dozen other executions against *John Lundy*, prior in date to those of the relators, and proved that he had sold all the debtor's goods, and that all the proceeds were swallowed by the older claims, except the \$15 credited on the two smaller executions. *No evidence* was given by either party touching the truth of the return.

Prior to the trial, the defendant propounded interrogatories, under the provisions of the Code, ch. 176, sec. 38, p. 667, to the relator, *Creed Nuckolls*, calling on him to say whether he had not ordered the defendant to hold up the executions. *Nuckolls*, in his answers, *denied* that he had ever given such directions. *Davis* offered to read these answers to the jury, but *Cook* objecting, on the authority of *McFarland vs. Hunter*, 8 Leigh 489, and *Vaughan vs. Garland*, 11 Leigh 251, the court sustained the objection, and refused to allow the plaintiff to read the answers.

After the evidence was all heard, a discussion arose between

counsel, as to the effect of the total want of testimony upon the question of the truth or falsity of the return. It was agreed that the court might expound the law, without written instructions.

FULTON, J.

All the rules which affect a sheriff in the execution of the process of a court, are applicable to a constable when executing, as in this case, process issued by a justice of the peace. I have always understood the rule to be, that as between third parties the official return of a sheriff is taken as conclusively true. And I think the rule is just as well settled that in a suit against the officer himself, his return is to be taken as *prima facie* true. Without multiplying citations, this proposition is sustained by the case of *Lathrop vs. Lumpkin*, 2d Rob. Reports, 49.

Independent of authority, I think this proposition is correct. The return of the officer is an *official act*, done under the sanction of his official oath. In the absence of all proof to the contrary, must we not presume it to be true? Is it not monstrous to allow any unsupported allegation in a declaration—the mere “flourish of the pleader,” to countervene the sworn statement of the officer, and force upon him the burden of proving its truth? Consider the position in which the officer would be placed. Hundreds, perhaps thousands, of process come into his hands; and a variety of returns are necessary. Is he always to come prepared, after the lapse of years, to prove the truth in every instance? No man would accept the office on such terms. It would paralyze the public service. I must instruct the jury that in the absence of proof to the contrary, they are to presume the return to be true, and find accordingly.

Thereupon, without leaving the bar, the jury found for the plaintiffs for the \$15, and there was judgment accordingly—the plaintiff not excepting to the ruling.

WHAT CONSTITUTES PUBLIC ROAD. EVIDENCE.

Commonwealth vs. Earhart.

Circuit Court of Wythe County, Va. October Term, 1857.

Mere user of a road will not make it a public highway.

Evidence that the county court has divided a road into precincts and appointed surveyors, and that the road has been travelled, is not sufficient to sustain an indictment for obstruction, if the land-holders have not acquiesced in its establishment.

An indictment was found against *John Earhart* in the circuit

court of Wythe, at May Term 1857, charging that the defendant "did obstruct a certain precinct of a public highway" (describing it) "by building a fence across the same." Plea—*not guilty*. The case was tried at this term.

Kent, Commonwealth's Attorney.
Floyd & Cook, for the defendant.

The question was, whether the road was a public highway, it being admitted that the defendant had fenced it up. *Kent* saying that he could not show any order of the county court establishing the road, offered in evidence an order of Wythe county court, made in the year 1812, appointing a surveyor of this road and ordering him to keep it in repair. The defendant objected to the admission of this evidence, on the ground that *user* of a way was insufficient to make it a public road; and his counsel relied on *Kelley's* case, 8 Grat. 632, and *Sampson vs. Gooch-land Justices*, 5 Grat. 241. *Kent* cited *Clarke vs. Mayo*, 4 Call 374.

FULTON, J.

Mere *user* of a road will not make it a public highway. There must be record evidence of its *recognition*, at least, as a public road, by the county court, which is the proper authority in the premises. But that record evidence need not go to the fact of the original establishment of the road. The authorities quoted at the bar show that if the county court has divided a road into precincts, and caused it to be kept in repair a long time, and it has been travelled over, and the persons through whose lands it runs, have acquiesced in this action and submitted to it, with knowledge of the facts, it may, as against them, be inferred to be a public road. I think this order is a sufficient foundation, and if followed up by evidence that the defendant and other land-holders on the line have acquiesced in what has been done since 1812, would justify the jury in inferring that he and they have consented to its establishment as a public highway. I must admit the evidence.

It was proved that a road run through the defendant's land, at the place where he erected the fence for a great length of time: that it extended through other lands, east and west, for several miles: that it had not been worked for eighteen or twenty years: that a new surveyor had been appointed, and worked on it a few days before defendant closed it up: that all the land-holders, throughout its whole length, the defendant included, had frequently changed its direction and location, at their own

will, and to suit their own convenience: that it was very difficult at some points to tell where it had run, and that some miles of its eastern portion were now closed up. The Commonwealth having closed her case,

FULTON, J., said: I do not think it necessary to protract this trial, or to require the defendant to call his witnesses. The Commonwealth has failed to make out a case. It is true she has shewn that the county court laid off this road into precincts, and directed it to be kept in repair, and that it was travelled upon and used for many years, and that part of it is even yet so used. But this is not sufficient. Failing to show that the road was ever established by the statutory proceedings, she is driven to the *inference* of its establishment from the presumed acquiescence of the land-holders; to a presumption of a *dedication* on their part. But such presumption is overthrown by her own evidence. It appears, on cross-examination of her own witnesses, that there never was such acquiescence: that the landholders always treated the roadway as their own property, and managed it as their own interest or convenience required; opening, closing and changing it as they pleased; and some of them seem to have shut up parts of it permanently. The defendant has only done the same thing, and I must hold that he had a right so to do.

Thereupon, there was a verdict of *not guilty*.

ASSAULT AND BATTERY—PROVOCATION—DAMAGES.

Wilkinson vs. Gleaves.

Circuit Court of Wythe Co. May Term, 1858.

The defendant in an action of assault and battery, may give in evidence, in *mitigation* of damages, an *antecedent* provocation, if there is good ground to believe that such provocation was the real impulse which moved him to commit the assault.

This was an action of trespass for an assault and battery. Declaration in the ordinary form. Plea, *not guilty*.

Leftwich & Sheffey, for the plaintiff.

McCamant, Staples & Cook, for the defendant.

The plaintiff proved that, in company with a friend, he was riding along a private road, through the defendant's land, and passing near his house. Defendant came out of his house, and called to plaintiff to stop. On getting within speaking distance, defendant said to plaintiff, "You have, I understand, said that I am a liar; and I intend to make you

take it back." The witness did not understand the plaintiff's reply to this charge. The defendant, having a stout cane in his hand, continued to approach the plaintiff, and said, "And you have said that my old father told a lie, and I intend to thrash you for that." Plaintiff replied, "I have said nothing more than you heard me say at Wytheville." Defendant said, "You need not deny it, because two men," (naming them) "heard you say it." Defendant paused long enough for plaintiff to have answered this last statement; but no reply being made, defendant struck at plaintiff with the stick. Plaintiff raised his arm, warding off the main force of the blow; but the end of the stick struck the plaintiff's head, cutting a wound which bled pretty freely. The stick flew out of defendant's hand. Plaintiff's horse swerved to one side from the blow. Defendant seized plaintiff, pulled him from the saddle, threw him to the ground, and commenced choking him. Both are unusually large, athletic young men; but defendant obtained a decided advantage by plaintiff falling from his horse. The witness pulled defendant away before any serious or lasting injury was inflicted, though plaintiff lost a good deal of blood; but was not prevented from attending to his usual business.

The defendant introduced a witness, *J. J. Percival*, and asked him this question, "Did you, a few days before this fight, tell *Mr. Gleaves* that you had heard the plaintiff say, that he, *Gleaves*, was a liar; and also that his father, *Major Gleaves*, was a liar." The plaintiff objected to any answer to these questions, on the ground that such statements, if made by the plaintiff, were no part of the *res gesta*: that the provocation was not given at the time of the assault, and therefore could not be taken into consideration.

Cook, for the defendant, submitted that this was good evidence in mitigation of damages. It shows that the attack was not wanton and unprovoked; that the plaintiff is himself at least partially in fault. The slanders uttered by the plaintiff upon the defendant were the causes of attack, avowed at the time, and the statement that they were the cause is a part of the *res gesta*. We only want to show that that statement was correct, by showing that the defendant had received the information which he stated as his reason for assaulting the defendant. The court will not be very particular in measuring the time within which the provocation must have been given. Here the plaintiff was taxed with the utterance of slanderous charges, and he did not repel the accusation, which was of itself a great provocation, being in effect a repetition of the insult. If he had denied the mat-

ters laid to his charge, we would have been without excuse. Every man who is charged with slandering another ought at once to rebut that charge, if not true; for even by silence he virtually affirms the slander. See 2d Greenleaf on Evidence, sec. 93, and *notes*: particularly the judgment of LORD ABINGER, in *Frazer vs. Berkley*, 32d Eng. Com. Law. Rep., 658.

FULTON, J. This evidence would afford no ground of justification, even if it were offered with that view, which it is not. But I think it my duty to admit it in mitigation of damages. It is true that it is laid down, as a general rule, that a provocation which tends to reduce the damages, must be so recent as to enable us to perceive that it was the immediate and direct cause which led to the battery: that it ought to be a part of the *res gesta*. This is a criterion hard to enforce; for it is impossible to tell how long a man's mind may be under the influence of excitement arising from a great wrong. But I do not consider it an inflexible rule. I do not think I am called on to say what is the period after which a man shall not be allowed to set up such an outrage in excuse for assaulting his traducer. I find in some of the cases that an antecedent provocation—as a libel or slander—has been admitted in mitigation of damages, although forming no part of the *res gesta*.

If any testimony could be admissible under such circumstances, this ought to be; for it is in proof that the very matter now tendered was made a part of the *res gesta*. The plaintiff was called upon to account for certain opprobrious charges against the defendant and his father; he neither retracted nor satisfactorily explained them. Now the defendant only seeks to show that in taxing the plaintiff with the authorship of these aspersions he was acting in good faith, upon information that the plaintiff had made them, and that he was not wantonly fixing a groundless quarrel upon the plaintiff, or attacking him on a mere pretext. I shall admit the evidence.

Mr. Percival then stated, that a few days prior to the fight between these parties, he heard the plaintiff, in a hotel, publicly denounce the defendant and his father as liars; and that he had communicated the fact to the defendant, two or three days prior to the assault.

The jury found for the plaintiff—damages, *fourteen dollars*. Plaintiff moved for a new trial, on the ground that the damages were too small; but the court overruled the motion, and gave judgment according to the verdict.

CONSTABLE'S RECEIPTS.—PRESUMPTION.

Simmerman and others v. Crockett.

Circuit Court of Wythe County, Va. May Term—1858.

The receipt of a constable is given for *two* debts, stating only their *aggregate* amount, and that amount is more than \$50. A motion lies upon this receipt, because the court will presume that the claims were both of such character and amount as to give jurisdiction to a justice of the peace.

The official receipt of a constable raises only a *prima facie* presumption, after six months, that the money has been collected, which presumption may be repelled by the return of "no property found," even though that return be made by a different constable.

The defendants having repelled the presumption, it is not competent for the plaintiff to introduce evidence tending to disprove that of the defendant, by showing that the officer *could have collected* the money. That question cannot be raised on motion for failing to pay over the money.

John S. Crockett gave notice to *Bennett*, a constable of Wythe county, and *Simmerman* and others, the sureties of *Bennett*, that at August Term, 1857, of the county court, he would move against them for \$57 09, the amount of two accounts on *Steele* and *Dehton*, placed in *Bennett's* hands for collection, and which he had collected and failed to pay over to the plaintiff, and also for fifteen *per cent. per annum* damages from the 13th day of January 1855, when the same ought to have been paid.

Bennett did not appear, but the sureties did, and moved the court to quash the notice, on the ground that it did not appear from the notice that the claims were such as could be collected by warrant. The notice claims the amount of *two* debts, amounting in the aggregate to more than \$50; and it does not appear that either of them was within the jurisdiction of a justice. The court overruled the motion.

The plaintiff then read a receipt in these words: "Rec'd July 13, 1854, of *J. S. Crockett*, two accounts on *Steele & Denton*, amounting to fifty-seven dollars and nine cents, which I promise to account for or return. *A. J. Bennett*, C. W. C." The plaintiff offered no other evidence.

The defendants then read in evidence two executions, dated August 17, 1854, issued by a justice of the peace, in favor of the plaintiff, *Crockett* against *Steele & Denton*—one for \$37 73, the other for \$19 36—both of which executions were directed to said *Bennett*, as constable. With the executions were also offered the warrants and judgments, and two accounts—each for a sum corresponding with one of the executions. On each exe-

cution was endorsed this return—"No property found. W. K. Bowyer, C. W. C."

To countervail this testimony the plaintiff called a witness, A. S. Arnold, and asked him this question, "Could not the amount of these executions have been made out of the property of Steele & Denton, after the date of said executions." To any answer to which question the defendants objected on the ground that it was irrelevant: that the only matter in dispute in this proceeding was whether the constable Bennett had collected the money or not; and no question ought to be made as to whether he could or might have collected it. If he failed to collect when it was in his power to do so, that would be the foundation of an action on his bond, for negligence; but the enquiry is an inadmissible on this motion. But the court overruled the objection and permitted the witness to answer. The defendants excepted and filed a bill of exceptions.

The witness then said that he had himself sold all the personal estate of Steele & Deaton, upon an attachment which came into his hands at the August Term (1854) of Wythe county court: nevertheless he thought the debts of the plaintiff could have been made, but he gave no reason for that opinion. On this evidence (which was all that was offered by the parties,) the defendants contended that judgment ought to be given in their favor, and moved the court to dismiss the proceeding of the plaintiff, with costs to the defendants; but the court gave the plaintiff judgment for \$57 09, with damages at the rate of fifteen *per cent. per annum*, and costs. The defendants excepted to the sufficiency of the evidence, and filed another bill of exceptions setting out the facts proved.

The defendants obtained a *supersedeas* to the judgment of the county court.

Cook, for the appellants, contended that the county court would have done right in dismissing the motion. It does not appear from the notice that the claims therein mentioned were such as are "recoverable by warrant" in the language of the 13th sec. of chap. 150, p. 598, of the Code. From the language of the notice, *non constat* but that *each* account amounted to \$57 09 cents; and in such case a justice would have no jurisdiction. The plaintiff in the notice must aver that the claims were of such an amount as that they could have been recovered by warrant.

2d. There is manifest error in the admission of Arnold's testimony, set out in the first bill of exceptions. The same section of the Code, before cited, enacts that "after six months from the date of the receipt of a constable, signed in his official capacity, that receipt shall be *prima facie* evidence of the receipt of the money." Here the plaintiff vested on the receipt. He

alleges in the notice that the money had been collected by the officer, and paid over. The receipt, uncontradicted, was sufficient evidence of that allegation. But the effect of that receipt was repelled by the return of *nulla bona*. And then the plaintiff seeks to make a wholly new case, by proving that the officer had neglected his duty: not that he had actually collected the money, but had improperly *failed* to collect it.

3d. Even upon *Arnold's* evidence the judgment is wrong. He states that he had himself levied an attachment upon all the effects of the execution debtors, before these executions went into *Bennett's* hands; so that there was nothing out of which *Bennett* could have made these claims. It is true he "thinks the debts could have been made"—but gives no reason for this opinion. The county court saw proper to give more weight to his unsupported opinion, than to his positive testimony that he had sold all the means out of which the debts could be made. On this testimony the judgment of the court ought to have been that the plaintiff "take nothing by his motion." All the facts are before this court upon the bill of exceptions; and this court can give such judgment as the county court ought to have given.

Brown, for the appellee, argued in opposition to the views of the appellant's counsel, and insisted that the action of the county court was correct.

FULTON, J.

If a constable collect money upon any claim entrusted to him to warrant for, and "recoverable by warrant," he and his sureties are liable for that money; and if he has given a receipt, signed in his official capacity, for the claim, that receipt is, after six months from its date, *prima facie* evidence that he has collected the money; and in such case if he do not pay it over to the plaintiff, it may be recovered from him and his sureties, by motion or ten days' notice; and in addition to the amount so received, fifteen *per cent.* damages is to be imposed on the officer and his sureties, for the failure to pay over. This a summary, and somewhat harsh proceeding, (though by no means too much so,) and the person adopting it must come directly within the statute. He must shew that the claim for which he holds the officer's receipt is one "recoverable by warrant." If it amounts to more than than \$50, it is not "recoverable by warrant," for that exceeds the jurisdiction of a justice of the peace; and if a party puts into a constable's hands a claim for more than \$50, the officer may be liable in his private, but not in his official capacity; and his sureties would not be bound by his receipt. Now in this case, if this were a *single* account for \$57 09—neither the constable, as a constable, nor his sureties would be responsi-

ble. He might be liable individually as upon any other contract. But here the notice alleges that there were *two* claims, amounting to \$57 09. The particular amount of neither is stated; and as the officer has given his official receipt for them, I do not think I would be justifiable in presuming that either of them was for an amount exceeding the limit of the jurisdiction. I am told that I am to read this notice as if the statement were "amounting *each* to" this sum; but I cannot accede to that. I think I must presume that here were two claims, each less than \$50, and therefore recoverable by warrant; but amounting in the aggregate to more than \$50. I therefore think the county court did not err in refusing to quash the notice.

But there was error in the admission of the testimony mentioned in the first bill of exceptions. What was the issue? The plaintiff in this notice alleged that *Bennett* had collected the money and failed to pay it over; and he alleged *nothing else*. The defendants came to trial, prepared to meet that allegation, and *nothing else*. They had no warning of any charge of neglect of duty, by failing to collect, when he could have collected. That is a wholly different charge, and one involving consequences much less onerous. For collecting and failing to pay over, the officer is made to pay out only the amount of the debt and interest, *but fifteen per cent. per annum* damages on the whole. On the other hand, if sued upon the bond, (the proper remedy,) for a *failure* to collect when he might have collected, the measure of damages is, at most, the debt and interest. By the course here adopted, the plaintiff has been allowed to claim the higher penalty, to support that claim by evidence tending only to subject the officer to the less penalty, and then upon that inadmissible and irrelevant testimony, has recovered the heavier sum.

The officer's receipt here was *prima facie* evidence that *Bennett* had collected the money. If the case had stopped at that point the plaintiff would have been, of course, entitled to his judgment. But it did not stop there. The defendants, as of right they might do, introduced evidence which repelled the *prima facie* presumption. It repelled it by showing that instead of having collected the money, the officer could not do so because there was "no property found." It matters not that this return was made by another officer than the one to whom the process was directed. Process may be executed or returned by another officer than the one to whom it is directed. This return repelled the presumption, and ought to have decided the case in favor of the defendants. It was no reply to this testimony to attempt to prove that that return was not true. If *Steele & Denton* had property, and the constable neglected his duty, he and his sureties are liable for that neglect; but not in this form of pro-

ceeding. They may be sued, and proper damages recovered; but *this* controversy is not the one in which to adjust that enquiry. The evidence of *Arnold* was irrelevant and improper; and for admitting it, the judgment must be reversed.

I have not considered it necessary to make up any opinion on the other question. It may be that upon the evidence of the plaintiff, even after it was admitted, the judgment ought to have been for the defendants; but as that evidence was not properly admitted, and is not to be again heard, it is not necessary to decide upon its weight.

My judgment is that the judgment of the county court be reversed with costs; and that the cause be remanded to the county court with instructions upon any future trial to confine the testimony to the single question whether *Bennett* had collected the money.

EXAMINATION.—INDICTMENT.—VARIANCE.—FORGERY.

Commonwealth vs. Burrows.

Circuit Court of Tazewell County, Virginia. March Term, 1858.

A prisoner is examined by the County Court upon the charge of forging a *promissory note*; he cannot be indicted for forging a *bond*, and for such variance the indictment will be quashed.

An indictment charges that the prisoner forged the bond of *R. M. N.* (alias) *R. N.*: the Commonwealth must prove that *R. M. N.* and *R. N.*, are the same person.

An indictment charges that the prisoner had in his possession a forged bond of *R. M. N.*, knowing it to be forged, and uttered and employed it as true, by passing it off, representing it to be the bond of *R. N.*: it is in proof that *R. M. N.* and *R. N.* are different persons; in such case the Commonwealth must prove that the name of *R. M. N.* is forged.

W. H. Burrows was indicted in the Circuit Court of *Tazewell* county, at March term 1858, for forgery. The indictment contained six counts. In the three first counts it was alleged, in different forms, that the prisoner forged a paper writing obligatory, purporting to be the *bond* of *R. M.* (alias) Robert Neel, for nine dollars, payable to the prisoner, with intent to defraud. In the other three counts it was charged, in different forms, that the prisoner had in his possession a certain forged writing obligatory, purporting to be the *bond* of *R. M. Neel*—and that well

knowing the same to be forged, he used and employed it as true, by representing to one *F. W. Kelly*, that it was the genuine bond of *Robert Neel*, and stating to Kelly that *R. M. Neel* and *Robert Neel* were one and the same person, and thereby obtaining from said *Kelly*, in exchange for said forged bond, goods to the value of \$9—which was the nominal amount of said forged bond.

Perry (C. A.) and *Stallard* for the commonwealth.

Stras, J. W. Johnston, Kelly and *Harman* for the prisoner.

The prisoner moved the court to quash the indictment on the ground that he had not been examined by the county court for the offences charged in the indictment. The record of the examining court was produced, and it appeared that the prisoner had been examined and sent on for trial for forging “a paper purporting to be the *promissory note* of *R. M.* (alias) *Robert Neel*, dated, &c., payable, &c.; and also for employing the same as true, knowing it to be forged.”

FULKERSON, J.

A promissory note is an instrument of very different character from a bond. The legal effect and obligatory force of the two papers vary in many and important particulars. I need not stop to detail those differences: they are familiar to every lawyer. Under an indictment for forging the one, the other could not be given in evidence, any more than you could give in evidence a bond under a declaration setting out a promissory note. It is true that our statutes authorize an action of debt upon the one as well as the other, and in many respects they are placed on the same footing; and it is as much a felony to counterfeit the one as the other; but all this does not change the character of the instruments, nor allow us to treat a paper as, indifferently, a note in one breath and a bond in the next. An acquittal upon a charge for forging the one, would be no bar to a prosecution for forging the other. I must quash this indictment. The Attorney for the commonwealth can send up a new indictment, charging the paper as a note—or I will detain the prisoner till another warrant be prepared, and the prosecution commenced *de novo*.

Finding that this course was to be pursued, the prisoner's counsel withdrew their motion, and agreed to plead to the indictment as it stood. He accordingly pleaded *not guilty*; and a jury was impanelled.

The instrument alleged to have been forged was tendered in evidence. It was in those words: “One month after date, I

promise to pay *Wm. H. Burrows*. nine dollars for value received—as witness my hand and seal, November 23d, 1857.

R. M. NEEL, [*Seal.*]

The prisoner objected to the admission of this paper under the three first counts of the indictment, until the commonwealth should prove that *Robert Neel* and *R. M. Neel* were the same person. It was so charged in those three counts, and they were the only ones in which an actual forgery was charged. The paper might not be the bond of *Robert Neel* and yet might be the genuine deed of *R. M. Neel*, unless it were shewn that one person only was known by both names.

FULKERSON, J.

I can only understand the three first counts of this indictment as alleging that *R. M. Neel* and *Robert Neel* are merely different names for the same person. In each count it is so declared. The language is "the bond of *R. M.* (alias) *Robert Neel*." The meaning and use of the word *alias* is well known. It serves to signify that the real name of the party designated is, in some respect, different from the appellation which may have been used to indicate him. In this instance its force is to allege that the name of *Robert Neel* was forged in a particular mode—to wit—by using the initials *R. M.* The commonwealth will be required to establish the truth of this allegation. Of course we cannot presume that *R. M. Neel* means *Robert Neel*. But I cannot sustain this objection. The question can only arise after the paper goes to the jury. It must be read and then the commonwealth will have an opportunity to prove that the signature there-to is, or was intended to be, that of *Robert Neel*!

The paper was then read, and *Robert Neel* and other witnesses were sworn. The evidence did not clearly establish the forgery. *Robert Neel* could only swear that he had no recollection of ever signing such paper. If he had done so he had utterly forgotten the fact. He had no middle letter in his name, and never signed "*R. M. Neel*." There had been dealings between him and the prisoner; but of this bond he knew nothing. He had a nephew, living near him, whose name is *Robert M. Neel*. Neither the witness nor any one present could tell whether the signature to the paper was that of this young man or not; and he was not in court, and could not be found.

Another witness, *Kelly*, proved that the prisoner sold this bond to him, in exchange for goods, and told him that the signature was that of *Robert Neel*, whose real name he stated to be *Robert M. Neel*.

The prisoner introduced no testimony, but moved the court to give two instructions, as follows :

First. That unless they were satisfied from the evidence that *R. M. Neel* and *Robert Neel* were one and the same person, they must acquit the prisoner upon the three first counts of the indictment.

Second. That if they believe *R. M. Neel* and *Robert Neel* to be different persons, then they must acquit the prisoner under the three latter counts, *unless* they shall also believe, *from the evidence*, that the signature "*R. M. Neel*" is a forgery.

FULKERSON, J.

I have already substantially disposed of the question raised by the first instruction. I have decided that as the three first counts of the declaration allege that *R. M. Neel* and *Robert Neel* are only different names of the same individual, their identity must be shewn. I therefore give the first instruction.

Nor can I perceive any good objection to the second. In three counts of this indictment it is charged that the instrument was forged: that it was forged in the name of *R. M. Neel*—but intended that that name should be taken as and for the name of *Robert Neel*; that the prisoner knew that it was so forged, and used and enjoyed it as the true bond of *Robert Neel*. Now the evidence tends very strongly to prove that the prisoner did use and represent this paper as *Robert Neel's* bond; and I may not be going too far in saying that there is certainly no proof that it is his bond. But this is not enough. If the paper is really the bond of *R. M. Neel*, it is not *forgery* to use it as the bond of *Robert Neel*. Evidence that it was *R. M. Neel's* obligation, and was employed as *Robert Neel's*, would be good under an indictment for obtaining money or goods *by false pretences*, but is wholly insufficient, and indeed irrelevant in this case. The foundation of these three counts rests upon two facts—first that the bond was forged—and that too by using the name *R. M. Neel* as a substitution for *Robert Neel*; and secondly—that the prisoner, knowing the paper was so forged, employed it as true. Now, the very first step is to prove that there has been actual forgery: that actual forgery is alleged to have been committed in the unlawful use of *R. M. Neel's* name. If *R. M. Neel* is shewn to be a different man from *Robert Neel*, (and of that the jury are to judge) the whole foundation of the case is swept away, unless the signature of *R. M. Neel* is shewn to be a forgery. Although this paper may not be *Robert Neel's* bond, *non constat*, therefore, that it may not be the genuine obligation of *Robert M. Neel*; and if so, *this* case is at an end. The prisoner, in such case, may be liable to prosecution in another case, which under this evidence would be only a misdemeanor: but in this proceeding I feel bound also to give the second instruction.

The jury found the prisoner *not guilty*.

AVERAGE. LOSS. SALVAGE.

In the U. S. Court, So. Carolina District. In Admiralty. July Term, 1858.

R. Morrison & Co. v. the Cargo of the Brig Unicorn.

The construction and legal effect of the terms loss, average and salvage in maritime contracts.

The facts are fully set forth in the opinion of the court.

JUDGE MAGRATH.

The argument in this case relates exclusively to the construction of certain words in a maritime contract, between the libellants and the master of the brig Unicorn, in the port of Havana. By the written obligation, the sum loaned was £1,622 17s, 8d., sterling, at a premium of twenty-five per centum; its payment secured by the block, the cargo and freight, of the brig. She sailed from Havana to a port of discharge in the Kingdom of Great Britain, calling at Queenstown for orders; put into the port of Charleston from stress of weather; was surveyed, ordered to be repaired, and then sold. The validity of the bond is conceded. The holders have libelled the cargo, which has been sold under a decree; and the proceeds of that sale, except so much as has been paid at the instance and with the consent of the Proctors, the costs and other charges, now remain in the registry subject to the order of the Court. That part of the contract submitted for construction, is the following clause: "In case of loss of said brig Unicorn, such an average as by custom shall have become due on the salvage." The amount in the Registry is not sufficient to pay the principal and maritime interests due to the libellants. And it is now contended that the libellants are not entitled to receive the whole amount; but only a proportion; to be determined by the ratio which the loan (whether with or without maritime interest is not stated) bore to the value of the ship, cargo and freight, at the time of her departure from Havana. The argument was made to rest principally upon the opinion expressed in 2 Arnold, on Insurance, p. 1203, in which he refers with approbation to the argument of Valin, and the 331 Article of the Code de Commercio, Liv. 2, Tit. 9.

There cannot be much doubt of what was the rule of the general maritime law. In the 18th article of the *Ordonnance de la Marine*, it is laid down: "*S'il y a contrats a la grosse et assurance sur au meme changement le donneur sera prefere aux assureurs sur les effets sautes du naufrage pour son capital seulement*" 2 Valin Comm. 20. The lender in such a maritime

contract would recover, in preference to the insurer, the principal sum; but not the maritime interest. And this rule is supported by Emerigon, who assigns as the motive of the preference, that the lender contributes directly and physically to the existence of the effects put at risk; whereas the insurer is a simple guarantor who inspires courage, it may be, but does not procure or furnish the thing itself. The lender, he adds, acquires, in the commencement, a lien on the thing put at risk; and it cannot be annulled by the alienation, which an abandonment subsequently works towards the insurer. Emer. on Ins., Ch. 17, Sec. 12. He is supported in this opinion by Pothier; but the rule is questioned by Valin. It is not necessary to enter upon that discussion which engaged these distinguished men. It was not directed, as this must be, to determine what is the law; a much wider field was opened in the consideration of what it should be. Valin tells us in his correspondence with Emerigon, that the latter submitted the question to the Admiralty, and it considered his argument consistent with common rights; but that the maritime law followed the response of the Roman Emperor: *Ego quidem mundi dominus, sed Lex maris*, (2 Comm. 80.) Boulay Paty, (8 tom., p. 229,) says the Admiralty of Marseilles was influenced by the argument of Valin; and the Code de Commerce adopted his opinion in the article which provides in such cases a division of the property saved, between the lender and assurer, in proportion to their several interests. The interest of the lender being the principal sum without the maritime interest; and that of the assurer, the amount which he has agreed to insure. In a question of maritime law, the Code de Commerce is regarded as a collection of regulations, municipal in their operation: but the Ordonnance de la Marine is described by Chief Justice Marshall, as compiled with great care by the first civilians of the nation, and with a view not only to all the ancient codes which are extant; but also to the customs and laws of all the Maritime States of Europe. 1 Brock R. 399.

In this case I cannot discover the authority upon which, in the United States, that construction can be supported which maintains a division of the property saved, where it is insufficient to repay the lender the sum advanced. The terms in which the rule is recommended by Mr. Arnold plainly shows that he did not understand it as adopted in Great Britain; and I think it equally clear that it never has been adopted in the U. States. In 8th Pet. R. 553, Judge Story, when he pronounced for the validity of the bond, added, as the legal consequence, that it must be upheld to the extent of the property pledged for its payment. The 18th Admiralty Rules provides that; in all suits on bottomry bonds, they shall be *in rem* only;

unless the master has, without authority, given the bond, or by fraud or misconduct avoided it, or subtracted the property, or unless the owner, by his misconduct or wrong, has lost or subtracted the property; in which case the suit may be *in personam*. And this rule is declaratory of the rule of the General Maritime Law, as enforced in the United States. The nature of, and the obligation arising from, these bottomry contracts, are well understood. In 1 Curtis R. 341, Judge Curtis says, "this is a contract of a peculiar character, distinguishable by very marked characteristics from an ordinary loan," and cites the language of Pothier that "it differs from all other contracts and forms a particular species by itself;" and that, also, of Boutay Paty, that "it is a contract having a specific name and character to itself." In *Pope v. Nickerson*, (3 Story R.,) and in *The Draco*, (3 Sumner R., 158,) Judge Story has thoroughly examined these contracts, and in the latter case, defines it, as a "contract for the loan of money on the bottom of a ship, at an extraordinary interest, upon maritime risk to be borne by the lender." And this definition is in accordance with *Simonds v. The Atlantic Insurance Co.*, 1 Pet. R. 436, 3 Kent Comm. 362.) This contract is received as of great antiquity, varying in terms according to the laws or customs of the places in which it is used, but having two great tests; the exclusion of the personal liability of the owner and the assumption by the lender of the risks of the voyage. The total exemption of the owner, except in the cases mentioned in the 18th Admiralty Rule, is illustrated in *The Nostra Senora del Carmine*, (29 E. L. and Eq. R., 572,) where the cargo having been taken out on bail and the fund proving deficient because of certain claims which had been interposed, the court refused an application to cause the owners of the cargo to pay in a further sum, the amount of the bail being assumed as the value of the cargo.

If the rule of an exemption of personal liability be so positively enforced, it is not obvious why the protection of the lender should not be equally considered, so far as it can be accomplished, by the application of the property to the debt, which it has been pledged to secure. These contracts are not forbidden; and although, as we shall presently see, subjected by Valin to severe criticism, are, nevertheless, with the guards placed around them, considered as important agencies in the advancement of commerce. Their operations may be controlled by the parties in the introduction of stipulations which modify, or, perhaps, wholly changed them. In this case, then, if the parties to this contract have introduced conditions which qualify or limit the rights they would otherwise have had, they must submit to that consequence; every contract, as a general rule is a law for the

parties to it. By this contract, the brig Unicorn, freight and cargo, are assigned over for the security of the loan taken, by the master, and shall be delivered to no other use or purpose whatever, until payment of the bond be first made with the premium which may be due thereon, the time of payment is specified, and then follows the condition, in case of loss of the said brig Unicorn, such an average as by custom shall become due on the salvage.

Before I proceed, however, to the consideration of that part of this clause, which has been argued, there is another which requires also consideration. What is to be understood by the words "in case of the loss of said brig?" The construction of the other parts of the sentence succeeds that, which is the proper understanding of these words. The case of the *Elephanta*, 9 E. L. and E. R. 558, is a leading case upon this point. In that case the bond provided that if the vessel and her cargo should be lost, miscarried, or cast away, the sum loaned and the interest should not be recovered. By stress of weather the ship was forced into Algoa Bay; was surveyed, and found to require considerable repairs. For these repairs advertisements were made; but the attempt was unsuccessful, and the vessel was abandoned for a total loss. Part of the cargo was sold, and the proceeds remitted to London, and part was re-shipped and reached England. Dr. Lushington, after commenting upon the little aid he had received from adjudicated cases, proceeds to examine the terms, lost and miscarry; cast away, of course, had no application to the case. The explanation of "loss" he derives chiefly from the case of *Thompson v. The Royal Exchange Assurance Company*, (1 M. and S. R. 30,) in which Lord Ellenborough held, that while the ship existed in specie, she was not lost; and although the expense of repairing was ruinous, yet she was not lost within the meaning of the bond, if existing in specie and capable of receiving repair. Accordingly the bottomry holder was held to be entitled to the goods re-shipped to England and the proceeds of those sold at Algoa Bay. In *Joyce v. Williamson*, referred to in *Park on Insurance*, 463, (reported in 26 E. C. L. Rep. 67,) the bottomry bond contained a clause, that if the vessel should be taken by the enemy, cast away, miscarry, or be lost, before her safe arrival at New York, it should be void. The vessel was captured by a privateer, retaken, and carried into Halifax, where part of the cargo was sold for salvage and repairs, and she afterwards arrived at New York with the remainder of her cargo.

The vessel was worth the amount of the bond, but not that amount with the repairs added to it. Lord Mansfield held the taking, not a loss intended by the bond; and the lender not li-

able for average or salvage. In the *Catharine* (1 E. L. and E. R. 679), the same rule is laid down; and the circumstances of the case are so similar to those in the case before me, that its decision would be sufficient authority to guide me to a conclusion. In *Pope v. Nickerson* (3 Story R. 487) the rule is laid down with great clearness. "The bottomry holders (says Judge Story) undertake the risk of the voyage and that the schooner shall be able to perform it, notwithstanding the enumerated perils which in the present case were fire, enemies, pirates, and other dangers and casualties of the sea and rivers. But they do not undertake that the vessel shall be able to perform the voyage without any repairs, and without any retardation: but only that the dangers and casualties of the sea and rivers, and the other perils shall not of themselves defeat the voyage. They are to be paid their money unless the voyage is defeated by such dangers and casualties, or other perils, and these alone. The case is not like that of an insurer, where the underwriters are liable for a particular loss, or for a total loss, either in fact or in a technical sense. In cases of bottomry there can be no such thing as an abandonment by which a loss not strictly total can be turned into a technical total loss." In *Simonds v. Hodgson*, 3 B. & A. 41, 23 E. C. L. R. 29, it was held that the bond might provide for the arrival of the vessel to any port, if she was unable to reach the port of final destination.

In the argument here, the case was rested upon a ground which would be applicable to an insurer. But the claim made is that of an owner; and there is no proof of any insurance. If there had been, no proof is before me of abandonment and acceptance. The argument of Valin is exclusively applicable to an insurer, and does not seem to have been considered by him as applicable to the case of the borrower. Recurring, then, to the construction of the "loss" in this case, it will be seen that the loan was made in Havana, in consequence of the damage which the brig had suffered. She was repaired, sailed from Havana, again experienced stress of weather, and came into the port of Charleston, where she was surveyed, and certain repairs were recommended. She was not repaired; the estimates are said to have been too high. A sale was recommended in consequence of this; and it was made. I will not say how far these circumstances, as against an insurer, may be sufficient to make this constructively a total loss; but they do not constitute certainly a loss within the meaning of the bond.—3 Story R. 487, 29 E. L. & E. R. 553. And I cannot find a better introduction to the reasons which support this conclusion, than in the language of Dr. Lushington: "If (says he) I should hold that the bottomry holder cannot recover under the existing circumstances, I appre-

hend that it must follow that no suit can be successfully maintained upon a bottomry bond where the ship was disabled from prosecuting her voyage; or the owners had a right and chose to abandon her; though the whole cargo may have been transhipped and brought in safety to the port of destination."—C. E. L. & E. R. 555.

The lender, in this case, had for his security an assignment of the brig, cargo and freight. If there is to be an apportionment as contended for, by the terms of the bond, it is confined to the loss of the brig. That a loss of the vessel, is not a loss of the cargo, so far as the security to the lender is concerned, is seen in the *Elephanta*. Here the vessel has been sold, and the proceeds are in the hands of the borrower or his agents. It is true that it is said, these proceeds have been applied to the payment of expenses. But I do not know anything of these expenses, and must hold them, therefore, to be such as effect the borrower. The cargo is not lost, or damaged, although the voyage is broken up. And the voyage is broken up, not because the cargo may not be transhipped, nor because the vessel may not be repaired; but because it is not profitable to the owner to do the one or the other. Can this, in any just sense, be termed "a loss?" If so, is it a loss from any of the perils or casualties which the lender in the bond consented to undertake? When the lender undertakes the risk of the voyage or the perils of the sea, it is a misapprehension to suppose that he does so for the benefit of the borrower. He is an insurer, not for the borrower, but for himself, to the extent of his loan. In fact, the borrower, to the extent of the loan, has no insurable interest; so perfect is the transfer, to the extent of the loan, that the lender may insure, but not the borrower. The personal liability of the owner is excluded, and the pledge of the thing, vessel or cargo, or both, substituted. If it is lost, the debt is not paid. But its arrival is not, if we speak with precision, the condition upon which the debt is to be paid; although it is a risk which, if it occurs, will defeat the payment. In contracts not of a maritime character, the lender may also bind himself to look to a certain security, and forego his personal action against his debtor; and if the security fails or is insufficient, his debt is lost, because he has no remedy.

In the same manner in these contracts, a loss of the thing pledged is a loss of the debt, because it is a loss of that to which the creditor agreed to look for payment. But this "loss" is the destruction of the property pledged, or its damage to a degree inconsistent with reparation. It is a loss, in fact, not by construction; and that loss occurring from the perils or casualties referred to in the bond. The obligation of this contract is as

sacred as that of any other, and the general rule applies to this, that neither party can modify the terms or affect the rights of the other party, unless by consent. By this rule, as we have seen, Emerigon is guided in the denial of the right of the insurer to participate with the lender, because the abandonment by the insured, if it gives the insurer a share with the lender, is a variation of the contract, and affects the rights of the lender by circumstances occurring after the contract is executed, and for which no provision is made in the contract itself.

But open as is the argument for a participation in these proceeds, to this objection, now stated; and which is an objection applicable to all contracts; yet perhaps to none would it be more productive of injury than the particular contract now before me. It begins by affirming a power in the borrower to deny the lender the benefit of his security, because it was constructively lost; although it actually existed in specie. This constructive loss results from the wishes and actions of the borrower, or his agents, and from it would arise benefit to the borrower and damage to the lender. He who before a constructive loss, was postponed to the lender, after he had made that loss, would participate with him. He who before that loss was entitled only to the whole. Such a rule would involve a temptation to error, which in too many cases would be most urgent. In this case I have not any evidence, which suggests a suspicion of *mala fides* in the sale of the vessel; nor have I any evidence that its sale was necessary.

The repairs for which this bottomry bond was executed, had only been made within a recent period. The vessel had encountered heavy weather, but she was not disabled, and had not become unseaworthy. It may be true that the estimates for the repairs, which had been recommended, were high, and that the owners, if present, would have done precisely what the master did do. But, if so, I would have to ask, with Judge Story, upon what ground is the bottomry not to be paid? Shall it be held that in addition to all other perils assumed by the lender, that of the convenience or profit of the borrower shall also be assumed? "It was a duty (says Judge Story) which the owners owed the bottomry holders, if the schooner could have been repaired so as to perform the voyage, to have made the repairs." (3 Story R. 487.) I can only regard the sale of this vessel as an act terminating the voyage, dispensing with the time and place mentioned in it for its payment, and entitling the lender at once to proceed to recover the sum loaned. The *Draco*, 3 Sumner R. 194. But assuming it to be otherwise, and that the vessel was in fact lost, the argument that the lender must divide with the borrower seems to me to be wholly untenable. If it is to be so

in case of loss, by the terms of the bond it must be confined to the vessel. That sale was made by the master, and the proceeds are held by the agents of the owners. It has already been seen that even where the cargo was mentioned in the bond, and the ship was sold, the cargo was adjudged to the lender. The principle laid down by Emerigon, that "the borrower can claim nothing from the effects saved, until the lender be satisfied," and that "the creditor never comes into apportionment with his debtor on the thing which is the pledge for the payment of the debt," is of obvious force and universal application: and if any case has been decided in Great Britain or in the United States, which can be considered as sustaining the principle contended for in this case, I have not seen it. The right of an insurer to participate has been maintained with great zeal; but they who denied this right of the insurer, did so upon the ground that he represented only the rights of the borrower; and they who maintained his right, denied that he should be considered as representing the borrower, but insisted that he should be regarded to the extent of his insurance as having contributed to the enterprise. Indeed, the argument of Valin is addressed to a consideration of the superior claim of the insurer over the bottomry creditor as an efficient and indispensable instrument in developing the extension of commerce; and his argument in part is specially rested on the ground that the increase of maritime loans with the heavy rates of interest attached to them, would extinguish it. This argument, however, is wholly inapplicable to the case of the borrower; and I do not know that in the objection which he makes to a bottomry contract he is at all supported.

In adopting the conclusion, that in this case, there has been no loss within the meaning of the bond, I might omit all reference to the other part of the bond to which the argument was specially addressed. Perhaps, however, it is well that I should express my opinion of the proper construction. "Average," in this connection, means proportion; "Salvage" here, signifies the thing saved. The average of the Salvage is the share or proportion of the property saved. Such an average as by custom, shall be due on the Salvage, is such a proportion as by the custom or law of a place, is due out of the property saved. And the intention is simply to declare, that in case of loss, the property saved shall be divided according to the law or custom of the country, if there shall be a law or custom prevailing upon the subject. (Jacobson.)

In this case if the vessel exists in specie, I would not hesitate, upon a proper application, to give the lender the benefit of it, as a part of his security. I entirely concur with Dr. Lushington, "that the general maritime law of the world is directly op-

posed to the sale of vessels in the manner in which this has been done, and to the consequences attempted to be engrafted upon it." Nor am I disposed to favor this summary proceeding to confer a title against owners, and extinguish all claims and liens which may exist against a vessel. When such consequences are to result, it is proper, if it is practicable, to obtain a decree of a court for the protection of the owner and creditor whose title and lien are sought to be extinguished.

JUDGMENT SET ASIDE. FRAUD.

Mussina v. Belden.

Supreme Court of New York.

Jarnagin for plaintiff.

Clarke for defendant.

DAVIES, J.

To the complaint filed in this cause, the defendants have interposed a demurrer:

First.—That this court has no jurisdiction of the subject of this action.

Second.—That the facts stated in the complaint are not sufficient to constitute a cause of action.

The facts, therefore, stated in the complaint, must, for the purposes of this argument, be deemed to be admitted. They are mainly, that a contract was made at Brownsville, in the State of Texas, in December, 1848, between Jacob Mussina, one of the plaintiffs, and the defendants, Stillman and Belden, by which they were jointly to purchase and hold certain lands, constituting the town of Brownsville, on the left bank of the Rio Grande.

It then proceeds to state that the plaintiffs, Simon and Jacob Mussina, were jointly interested in such contract and the lands purchased in pursuance thereof, as were then also the defendants, Belden, Stillman and Alling; that the defendants, Basse and Horde, were the attorneys of the parties in relation to such contract, and the purchasers of land under the same; that in December, 1849, the defendants entered into a conspiracy to defraud the plaintiffs out of their interests in said lands, and rights under the contract; that in pursuance of such conspiracy they made direct conveyances, instituted legal proceedings and took various fraudulent steps, whereby the plaintiffs' title was

impaired, their lands depreciated in value, and they have thereby lost the same; that as a part of such conspiracy and fraud, in the year 1849, a suit was instituted in the United States District Court for the District of Texas, by one Don Rafael Garcia Cavazos and wife against the parties to this action, for the recovery of the lands thus purchased under said contract, and that such proceeding were had therein, that in January, 1852, a decree was rendered against the parties herein, whereby their titles to said land was declared illegal and invalid, and they were perpetually enjoined from settling it; that such decree was obtained by the fraudulent acts and contrivances of the defendants, and with the intention to deprive them of their interests in said lands, and their title thereto.

Wherefore the plaintiffs demand judgment for the damages which they have sustained, and that the defendants may be required to come to an account with the plaintiffs, of and concerning all moneys or things by them or either of them received, an account of the sales of the lands thus jointly owned by the parties to this suit, and of and concerning all the rents and profits of said lands, and of and concerning the rents mentioned in the complaint, as due from the United States.

DAVIES, J.

Upon the facts stated in the complaint, there can be no doubt (if this court has jurisdiction of the subject matter of this action) that the defendants are legally bound to respond to the plaintiffs in damages, if any, which they may have sustained by reason of the fraudulent acts of the defendants.

Neither can there be any doubt upon these facts, that the plaintiffs are entitled to an account from the defendants, of the moneys which they have received upon the sales of the land, or the rents and profits thereof.

It is contended, on the part of the defendants, that this court has no jurisdiction, from the fact that the lands, out of which the controversy arises, are situate in Texas, and that the title in them may be incidentally involved.

A similar objection was taken in the case of *Massie v. Watte*, 6 Cranch R. 148.

In that case a suit was instituted in the United States Circuit Court for the District of Kentucky for the purpose of obtaining a conveyance of lands lying in the State of Ohio.

Chief Justice Marshall said in that case, that if that cause was to be considered as involving a naked question of title; the jurisdiction of the Circuit Court of Kentucky would not be sustained, and he adds, "But when the question changes its character—when the defendant in the original action is liable to the

plaintiffs, either in consequence of contract, or as trustees, or as the holders of a legal title acquired by any species of *mala fides* practiced on the plaintiffs, the principles of equity give a court jurisdiction whatever the former may be proved, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

Chief Justice Marshall refers to Lord Hardwick's opinion in the celebrated case of Lord Baltimore *v.* William Penn. This was a bill filed in the Court of Chancery for a specific performance of articles settling the boundaries of the then colonies of Maryland and Pennsylvania, made and executed between the respective proprietors thereof.

Two objections to the jurisdiction of the court were taken :

First—That the court had not, and ought not to take jurisdiction, for that the same was in the King and Council.

Second—That the agreement ought not to be carried into execution by the court, as it affected the estates, rights and privileges of the planters, &c., without the district, and the tenure and laws by which they live.

The case seems to have been maturely considered, and Lord Hardwicke says, in the commencement of his opinion, indicating clearly his view of its gravity and importance, that the subject was "of a nature worthy the judicature of a Roman Senate, rather than of a simple judge, and my consolation is, that if I should err in my judgment, there is a judicature equal in dignity to a Roman Senate that will correct it." After discussing the power of the King in council, he says that the King in council cannot decree an agreement, not acting *in personam*, as that court could; that the conscience of the party was bound by the agreement, "and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it exists." He further remarks, "that the court could not enforce their own decree *in rem* in the present case, but that was not an objection against making a decree in the cause—for the strict primary decree in this court, as a Court of Equity, is *in personam*." * * * *

"In Lord King's time, in the case of *Richardson v. Hamilton*, Attorney General of Pennsylvania, which was a suit for land and a house in the town of Philadelphia, the court made a decree, though it could not be enforced *in rem*. In the case of *Lord Anglesey*, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem*, but the party being in England, I could enforce it by process of contempt *in personam*, and

sequestrations, which is the proper jurisdiction of this court." (1 Ves. R. p. 444.)

In the case of the Earl of Derby *v.* Duke of Athol, (1 Ves. 201,) the bill was filed to have discovery concerning the general title of the Isle of Man. The defendant pleaded in general to the jurisdiction of the court, that the Isle of Man was an ancient kingdom, not part of the realm, though belonging to the crown of Great Britain, and that no title to lands, &c., there ought to be tried or examined into here. The Lord Chancellor sanctioned the jurisdiction of the court, and observed that if the question raised was one of equity it would certainly be for this court to determine it, although it was a matter out of its jurisdiction, as in the case of the Isle of Sarke. He also says, "so that upon a mortgage made of this Isle, and both mortgagor and mortgagee resident within the jurisdiction of this court, upon a bill concerning it, the court would hold jurisdiction of it, for a court of equity *agit in personam*."

The case of the Isle of Sarke, referred to in the preceding case, was that of Toller *v.* Carteret. (2 Vern. 294.) In that case the defendant being the owner of the Isle, had executed a mortgage thereon, and upon a suit brought in Chancery in England, objected that the court had no jurisdiction, as the Isle of Sarke belonged to the Duchy of Normandy. The Lord Keeper said that the Court of Chancery had jurisdiction, the defendant being served with process here, *equitas agit in personam*.

The case of the Count Argilasse *v.* Muschamp, (1 Vern. 75,) upon the facts stated, is not dissimilar to the present. The plaintiff sought to be relieved against a rent charge upon lands in Ireland, obtained, as he alledged, by fraud.

The defendant objected to the jurisdiction, first, that the lands lying in Ireland, the matter was properly examinable there, also the defendant was a resident in Ireland, and the doctors of the civil law were cited, who treat of jurisdiction in point of residence, arising only where a man commonly inhabits, and where he may be said to have his domicile. On a petition for rehearing, the plea was again overruled. (Same cause, 1 Vern. 135.)

It was replied on the part of the plaintiff, that the primary jurisdiction of the courts is to relieve against frauds and cheats, and it was contended that if the laws of Ireland did not so differ from those of England, which they did not, as to allow of a fraud and cheat, that court had then the greater reason to relieve the cause and see justice done.

The Lord Chancellor says, "This is surely a jest put upon the jurisdiction of the court by the common lawyers." The plea was overruled, and the defendant ordered to pay costs for endeavoring to oust the court of its jurisdiction. The Lord Chan-

cellor cited the case of *Archer v. Preston*, (1 Eq. Ab. 183, ch. 8,) in which case, if in any, he says the jurisdiction was local; the matter there being only for land that lay in Ireland; yet the defendant coming into England, a bill was exhibited against him here, and a *ne exeat regno* granted, and he put to answer a contract made for those lands. To the same point may be cited the case of the Earl of Kildare *v. Sir Maurice Eusted and Fitzgerald*, (1 Vern. 419.)

This case would seem to settle very clearly the jurisdiction of the Court of Chancery in England in cases like that now under consideration.

In our own State it has been regarded, since the decision of Chancellor Sanford, in *Ward v. Anedondo*, (Hop. 213) that the like rule prevailed here. The Chancellor says, "The elementary principle seems to be that the jurisdiction may be upheld whenever the parties, or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced so as to do justice between the parties." The cause in reference to which the controversy arose in that case, was to contract made in Havana, for the sale of lands lying in East Florida. The Chancellor held that his court had jurisdiction, and that to entertain that was going no further than has been done by the English Court of Chancery, and the law in this country cited from *Cranch*. To the same point may be cited the cases of *Shattuck v. Cassidy*, 3 Edw. C. R. 152; *Mead v. Merritt*, 2 Paige 402; *Mitchell v. Bunce*, id., 606; *Sulptrin v. Fowler*, id. 280. If there could remain any doubt as to the jurisdiction of the Court of Chancery and of this court, as succeeding to the power and jurisdiction of that court, it must be regarded as disposed of by the Court of Appeals in the case of *Newton v. Brownson*, (3 Kern. 587.)

This case also disposes of the objection so earnestly pressed upon the court by the defendant's counsel, that the action relating to lands is local, and can only be tried, according to § 123 of the Code, in the county where the lands are situated.

This provision of the Code the court held was inapplicable, when the land which is the subject of the action lies out of the State.

Neither is it necessary that the parties defendants should be residents of this State to subject them to its jurisdiction. All the cases show that it is only essential to acquire jurisdiction of their persons, and this can be accomplished by the service of process on them, however brief, may be their sojourn within the State, or however temporary it may have been intended to be.

The cases already cited, it is deemed, clearly establish the jurisdiction of the Court of Chancery in cases where the parties

are subjected to its process, in the Courts of the United States, that of England and of this State, even though the title to lands situated within its jurisdiction may be affected thereby. To these cases may be added *D'Ivernoies v. Leavitt*, decided at General Term, in this District, in October, 1856.

In harmony with these views, Story, in his *Conflict of Laws*, at section 548, affirms the same doctrine.

It was urged, on the argument, that a contrary opinion had been expressed by the Supreme Court of Louisiana, in a suit pending in that court between these plaintiffs and these defendants. Whether or not the judgment in that case can be pleaded in bar to this suit, is a point not now necessary to discuss or consider. The case is referred to in this connection only as an authority, and I think it entirely fails to be regarded as such. The court, in giving their opinion, disclaim the power of a Court of Equity, and therefore deem the cases in the English Court of Chancery inapplicable to their system of jurisprudence. They also think the case of *Massie v. Watts* not authority, because "the people of Louisiana have always resisted the encroachments of foreign modes of procedure, and especially the peculiar doctrine and forms of chancery."

But it seems to me that this case is in direct conflict with the decision of *McDowell v. Reed*, (3 Louis. R. 891.) That was a bill filed in the courts of Louisiana to enforce a trust in reference to lands and houses located in Mississippi. Stenbridge, J. in the court below, had decided against the plaintiffs, and, on appeal, the Supreme Court reverses his judgment. Eustis, Chief Justice, in delivering the opinion of the court, says: "We have held the case a long time under advisement, and after thorough investigation of the subject, we are forced to dissent from the conclusions of the learned judges before whom the case was tried. We think the case referred to (*Massie v. Watts*, supra,) by the court for the plaintiffs, establishes the principle that when a court is called upon to enforce a right, it may avail itself of its jurisdiction over the person to do justice when a subject matter beyond its territorial jurisdiction, though lands may be affected by the decree.

It seems to me that this opinion, rendered after long advisement, and thorough investigations of the subject, carries with it a much higher authority, and is entitled to far more consideration, than one founded mainly on the peculiar system of jurisprudence prevailing in Louisiana, and upon the prejudices of the people, who, it is said, have always resisted the encroachment of foreign modes of procedure, and especially the peculiar doctrines and forms of Chancery.

Especially is it of inferior authority, opposed as it is to the strong current of opinion already cited.

I therefore dismiss it as of small moment in this case, particularly as it seeks to overthrow a decision of its own Supreme Court, which commends itself to my judgment as eminently sound and conclusive.

It is also insisted, on the part of the defendants, that the proceedings in Texas for the recovery of the judgment in the suit of Cavajos, however fraudulent on the part of these defendants, and how greatly soever the plaintiffs may be damnified thereby, are conclusive among them, as being the judgment of a court of competent jurisdiction. I do not so understand the law, and that for such a wrong committed, the party injured has no redress. While full faith and credit are to be given to the judicial proceedings of the courts of our sister States, I do not understand that a party injured by the machinery of these courts, or who have been deprived of rights, property or liberty, by those who may have improperly or fraudulently set them in motion, has no redress against the wrong doers.

It was laid down in *Fermer's case*, (3 Coke 77,) that the "common law doth so abhor fraud and covin, that all acts, as well judicial as otherwise, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment wrongful and unlawful; *quod alias bonum et justum est, si per vim vel pandem petatur, malum et in justum efficitur.*"

In the *Duchess of Kingstreet case*, (2 Smith's leading cases, 478,) the Lords in Parliament submitted to the judges the following question: Whether the counsel for the crown may be admitted to avoid the effect of a sentence in a suit for *judicatum* of marriage, by proving the same to have been avoided by fraud and collusion? And the judges were unanimously of the opinion that evidence might be given to avoid the effect of such a sentence by proving the same to have been obtained by fraud or collusion.

The note in *Fermer's case* is cited with approbation by Thompson Chief Justice, in *Borden v. Fitch*, (15 John. 121, at p. 145.) He says: "Whenever he (the defendant in this case) seeks to avail himself of any benefit from a divorce, procured by his own fraudulent conduct, although brought in collaterly, it would seem to me competent to allege this fraud, otherwise he would be permitted to derive a benefit from his own misconduct—a position altogether inadmissible."

This case is cited with approbation in that of *Andrews v. Montgomery*, 19 John. R. 164; *Webster v. Reed*, 11 How. U. S. R. 460; *Perry v. Meadowcraft*, 10 Beavan, 122; *Fletcher v.*

Rapp, 1 Smedes & Marshall, ch. 375; *State v. Little*, 1 N. H. 257; *Dobson v. Pearce*, 2 Herman, 156.

On a review of all the cases, and from much reflection upon them, I am clearly of the opinion that the demurrer cannot be sustained, but that the plaintiffs are entitled to a judgment, with liberty to the defendants to answer, on payment of costs, within twenty days.

DEFECTIVE WRIT. MOTION. PLEADING.

Phillips v. Tipton.

Circuit Court of Carroll Co. Va. August Term, 1858.

The court will not, on motion, set aside an office judgment and dismiss the action for any defect in the writ. Such a defect can be taken advantage of only by plea in abatement, filed at the proper time.

M. & W. Phillips brought an action of trespass against *W. L. Tipton* in the county court of Carroll. The writ directed the sheriff "to summon *Wm. L. Tipton* to appear, &c., on the first Monday in April, 1858, to answer of a plea of

Neither the names of the plaintiffs, the character of the action, nor the amount of damages appeared in the writ. On this writ the defendant made and signed the following endorsement: "I acknowledge legal service of the within summons;" and the writ never went into the sheriff's hands at all.

On the return-day, no appearance being entered, the clerk made the *common order*, which was confirmed at the May rules, and an *office judgment* rendered up. The declaration was in proper form, charging the defendant with the illegal seizure and sale of a flock of sheep, belonging to the plaintiffs. The case was placed on the docket of writs of enquiry for the June term. At that term the defendant entered his appearance, and "moved the court to set aside the orders made in the cause, to quash the said writ of summons—to discharge him from answering said writ, and to dismiss the suit," on account of the aforesaid defects and imperfections in the writ. After argument this motion was sustained, and the court dismissed the suit, rendering judgment against the plaintiffs for costs.

To this judgment the plaintiffs obtained a *supersedeas*, and the same came on at this term to be argued.

Cook for the appellants, pointed out the express provisions

contained in section 18, ch. 171, p. 648, of the Code, enacting that *no* defect in the writ shall avail the defendant, unless pleaded in abatement: and the 45th section of the same chapter forbids any such plea after an office judgment has been entered. He also referred to the decision of this court in the case of *Wadsworth, &c. v. Coleman and others*, reported in the Law Journal for April 1858, p. 185.

Poage for the appellee, submitted the case without argument.

FULTON, J.

The action of the county court was wholly irregular and improper. A defect in a writ of summons, commencing an action, is not to be regarded, unless it be pleaded in abatement; and a plea in abatement cannot be received after an office judgment is entered. To have properly objected to this writ the defendant should have appeared, *on the return day*, and filed his plea in abatement. Not having done so he has lost all benefit of the objection. The question could not be raised by *motion*, at any stage of the case, and of course not at the time this motion was made, when the defendant had lost even the right to plead in abatement.

The judgment of the county court is reversed *with costs*, and the cause remanded to that court, with instructions to reinstate it on the docket, and to execute the writ of enquiry and render judgment for the plaintiff, unless the defendant should *plead to issue*.

HOUSE-BUILDING—RIGHTS OF OWNERS OF ADJOINING PROPERTY.

John Dunlap v. Wallingford & Singer.

District Court of Alleghany County, (Penn.)

One who erects a house in a city, near the line of neighboring property, must make his foundation with proper regard to the probable future use of the property adjacent.

The owner of adjacent property who builds subsequently, may excavate the earth for his foundation deeper than the foundation of the first erected building, by giving timely notice of his intention so to do; and in such case it becomes the duty of the first builder to take proper measures to avoid any evil consequences, and the duty of the second to use ordinary care and diligence in the prosecution of his work, and to afford the first builder an opportunity to come upon his lot and underpin his wall.

If, instead of giving such notice, he undertakes to underpin it himself, he must do it with care, and is responsible for negligence.

The charge of the court was delivered by

HAMPTON, P. J.

Gentlemen of the Jury: This is an action on the case brought by the plaintiff to recover damages, alleged to have been sustained by him in consequence of the negligence of the defendants in excavating the earth too near the plaintiff's house, and undermining and destroying his foundation, rendering the entire building, consisting of two small houses, untenable, and compelling him to take them down and rebuild them.

It appears the plaintiff erected, in the spring and summer of 1846, two small houses, being together, 18 by 30 feet, with a partition wall between them on the line of his lot, between Market, Wood, Second, and Front streets, in the city of Pittsburgh. The building was on, or within, an inch of the line, at the end of the lot, towards Wood street, and at the distance of some 80 or 90 feet from the same. The surface of the ground was descending from Market to Wood streets. The great fire of 10th April, 1845, had destroyed all the buildings in that part of the city. The plaintiff had sunk his foundation a few feet below the surface, and made a basement story, without any cellar underneath.

The defendants were the owners of the lot fronting on Wood street, and extending back to the end of plaintiff's house, which, as we have said, was on his line. On this lot, with the exception of a strip next to plaintiff's lot, had stood a frame warehouse, which was destroyed by the great fire. The defendants wished to rebuild, and in the winter of 1846-7, made the necessary arrangements for that purpose. After clearing the rubbish out of the old cellar, the workmen commenced excavating the remaining space adjoining the end of plaintiff's lot, for an area, keeping on a level with the old cellar of the former warehouse. They continued un'til they approached within a certain distance of plaintiff's house, when, apprehending danger to the same by proceeding, they carried forward channels, or narrow excavations, under the foundation wall of plaintiff's house, building up stone piers, or pillars, as they dug out the strips of earth at short intervals, until the whole sub-wall, or underpinning, was completed. This excavation was carried to a depth of some nine or ten or more feet below the foundation wall of plaintiff's house, on account of the descending surface of the earth towards Wood st., which is alleged by defendants to be necessary for purposes connected with their warehouse, and is said to be only of the usual and ordinary depth of cellars, similarly situated in the city.

It is alleged by the plaintiff that defendants undertook to underpin, or build, the sub-wall, and that they did it in so careless, unskilful and negligent a manner, as to cause the injury complained of. Defendants allege that the excavation and underpinning of plaintiff's wall was the joint work of plaintiff and themselves, and that both the plan and extension were sanctioned and approved by plaintiff; and that after the work was completed, the plaintiff expressed himself fully satisfied therewith, and in token of his entire approbation, said he would make a present of some tin-ware to the chief workman engaged in the work. It was further alleged by defendants, that the injury complained of was caused by the water from plaintiff's roof and hydrant; and, moreover, that plaintiff had not sunk his foundation to the proper depth.

Although the amount of damages claimed in this case is not large, yet the principles involved are of vast importance in towns and cities, where men are constantly engaged in building.

The common law, which is said to be the perfection of human reason, has adopted the maxim of the civil law, that every man must use and enjoy his own, as not to injure or destroy the rights or property of another. And this maxim is founded on the plainest principles of common justice, without whose observance the very basis, not only of security, but of government itself, would be destroyed, and the whole fabric fall to pieces. In populous towns and cities, this salutary principle is more indispensable than in the country, where men in the ordinary business transactions, are comparatively but seldom brought into contact. And consequently, a rigid adherence to this just and simple rule cannot be too strongly urged upon our business community, as its careful and conscientious observance would prevent much litigation, trouble and expense.

So far as we have been able to ascertain, but one case on this subject has ever been brought before our own Supreme Court, and that was decided on the insufficiency of the plaintiff's building; *Richart v. Scott*, 7 W., 460. We glean, however, from the opinion delivered in that case by Mr. Justice Kennedy, some principles which may aid us in settling some of the questions in this. That case, we think, establishes these principles:—That the owner of a lot of ground, in a town or city, who wishes to erect a building on the line thereof, which divides it from an unimproved lot of another, is bound to excavate, to a proper and reasonable depth, to procure suitable materials, and use due care and skill in the erection of his building, so that the adjoining owner may, if he wishes to build, by proper care and skill, and the use of ordinary means, excavate not only *up to* his line, but also *deeper* than the foundation of the first building, without any

damage thereto. Otherwise, the first builder would acquire an undue advantage over his neighbor, and destroy or greatly diminish the value of his property, for which he had paid a full consideration. The wall of the first builder must be of sufficient depth, material and dimensions, and with such skill as to stand upon its own foundation, when all the earth to the same depth is removed from the adjacent lot. And if this be not done, he has no right to complain, and cannot recover from his neighbor for any injury he may sustain in consequence of such removal.

On the other hand, if the second builder wishes to sink his foundation *below* that of the first, he is bound, in doing so, to use suitable care, caution, skill, and diligence, by the ordinary, proper, and customary means, to prevent any injury or damage to the first building. And if he fail to do so, he will be responsible for such damages as naturally and necessarily result from his default.

These general principles, we think, are clearly deducible from the case before cited. But what constitutes due care, caution, and diligence on the one hand, or negligence on the other, is a question of fact for the jury, and no invariable rule can be laid down on the subject, inasmuch as it depends upon the circumstances of each particular case. The character of the surface and soil—the location of the lots—the prospect and probability of the improvement of that particular neighborhood, together with the character and purposes of the buildings that may, or are likely to be erected, are all questions, with many others, which enter into the inquiry whether or not due care, skill, and diligence have been observed. But *some* things the law, as settled in other States, has declared a man may do, without being liable to an action for damages.

The Supreme Court of Kentucky have decided, that "if one who is digging a foundation upon his own ground so weakens the earth as to induce the fall of another, he is not responsible for the loss, unless it was reasonably certain that such would be the effect of the act, and he failed to apprise the other party, that he might use the proper preventives." But he *is* responsible, if he digs away the earth on his own ground so *carelessly and negligently* that the plaintiff's house falls thereby." *Shrieve vs. Stokes*, 8 B. Monroe, 453.

And in Massachusetts it has been held, that, when A. built a house on his own land, within two feet of his boundary line, and ten years the adjoining owner dug down his own land to a distance of some thirty or forty feet, so deep as to endanger the house, and A. left it for that reason, and took it down, it was held that he could not maintain an action for the damage to the house, but that he was entitled to damage caused by the falling

of his natural soil into the excavation so made. (*Thurston vs. Hancock*, 12 Mass. R. 220.) C. J. Parker, in delivering the opinion of the court, says: "A man in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequence to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of a house put upon or near the line by his neighbor. For, in so placing the house, the neighbor was in fault, and ought to have taken better care of his interest." Again he says: "A man who builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land, and by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience." In another part of the same opinion, speaking of the plaintiff, he says: "He knew, also, the shape and nature of the ground, that it was impossible to dig there without causing excavations. He built at his peril, for it was not possible for him, merely building upon his own ground, to deprive the other party of such use of his as he should deem most advantageous. There was no right acquired by his ten years' occupation to keep his neighbor at a convenient distance from him."

The Supreme Court of New York, many years ago, held that "one building a house on his own land, contiguous to or adjoining the house of his neighbor, may lawfully dig the foundation below that of his neighbor's house; and if he use due care and diligence to prevent injury to his neighbor, he will not be liable for any consequential damage that may ensue." (*Panton v. Holland*, 17 Johns. R. 92.)

And in a recent case, decided in 1850, by the Court of Appeals, N. Y., on an appeal from the decision of the Supreme Court of that State, Bronson, C. J., says: Let us now see what a man may do in the enjoyment of his own property, without being answerable to others for consequential damages—always assuming that he acts with proper care and skill. He may set fire to his fallow ground, and though the fire run into and burn the woodland of his neighbor, no action will lie. (*Clark v. Foot*, 8 John. 421.) He may open and work a coal mine in his own land, though it injure a house which another has built at the extremity of his own land. (*Partridge v. Scott*, 3 Mees. & Welsb. 220.) And he may do the same thing, though it cut off an underground stream of water which before supplied his neighbor's well, and leave the well dry. (*Actor v. Blundell*, 12 W., 824.) He may build on his own land, though it stops the light of his

neighbor, (*Parker v. Foot*, 19 Wen. 309,) and even though he build for the very purpose of stopping the lights. (*Mahon v. Brown*, 13 W. 261.) He may pull down his own house, though the adjoining house fall for the want of the support which it before had; and he may do it without staying up the adjoining house, *that being the business of the owner*. (*Payton v. Mayor and Commonalty of London*, 9 B. & C. 725.) He may pull down his own wall, though the vaults of his neighbor are thereby destroyed. (*Chadwick v. Traider*, 6 Benj. N. C., 1.) He may locate a house and make cellars upon his soil, whereby a house on an adjoining soils falls down. (Com. Dig. Action on the case for nuisance, 6.) He may dig on his own land, though the house which his neighbor has previously erected at the extremity of his land be thereby undermined and fall into the pit. (2 Roll's Ab. Trespass, 1; Pl. 1; *Wyatt v. Harrison*, 3 B. & Ad., 871.) In *Panton v. Holland*, (17 John. 92,) the defendant, for the purpose of laying the foundation of a house on his own land, dug some distance below the foundation of the plaintiff's house, in the contiguous lot, whereby the walls of plaintiff's house were cracked, and the house was otherwise injured, and it was held that no action would lie. In *Iasala v. Holbrook*, (4 Paige 169,) the plaintiffs were the owners of a church, built within six feet of the line of their lot, and the defendant, for the purpose of building in his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet an injunction to restrain the execution, which had been granted by a master, was dissolved by the Chancellor, on the ground that the defendant was exercising a lawful right. In *Dodd v. Holme*, (1 Ad. & Ellis, 493,) the defendant was held to be liable on the ground that the injury complained of was occasioned by his negligence.

The general doctrine contained in these cases is believed to be based on sound principles, (with the exception of the rule in *Thurston v. Hancock*, in relation to damages,) and in default of any settled rules by our own Supreme Court, we have adopted the principles here laid down, with certain modifications, which will hereafter be noticed.

If the first builder may disregard the character of the surface, soil, and probable improvement of the adjacent lots—the use to which they are likely to be devoted—and the excavations which may be necessary for such improvements, and throw upon subsequent builders all the risk, expense, and difficulties consequent upon such exclusive privilege to the former, such adjacent property would be rendered, in a great degree, worthless, and all im-

provements in towns and cities cease. It would be difficult to foresee all the injurious consequences of this doctrine, if carried out to legitimate extent. An unimproved lot in the city of Pittsburgh or Allegheny would be of little value to the owner, if he were not allowed to dig in it for the purpose of building; and if he may not remove the soil thereof for that or any other proper purpose, lest he should disturb the natural support of his neighbor's lot, he is deprived of the use and enjoyment of his own property, or is limited and restricted therein by the convenience, even whim or caprice of another. Under the operation of this rule, a person would have it in his power, by purchasing lots at proper points in the different parts of a town or city newly laid out so to impair the value of the other lots, either in the hands of the proprietor, or subsequent purchasers, as necessarily to throw them into his own hands, as the only one who had the legal right to improve them. This proposition is so at variance with every principle of justice and sound morality, as to contain, in its very statement, its own refutation.

If the owner of a lot erects his building at the line dividing it from one unimproved, he must take the risk of his position, and must use the necessary means to sustain his wall, if his neighbor, building subsequently up to his line, wishes to sink his foundation lower. And this he must do at his own expense.

If the second builder wishes to sink his foundation deeper than that of the first, he should give him reasonable notice of his intention, and permission, if requested, to come on his lot to underpin, shore up, or employ such other means as are best adapted to secure the safety of his wall and building. If this be done, and ordinary care and skill observed in digging and removing the soil from his own lot, to such a depth as may be necessary and proper for the purposes of his building, he is not responsible for any injury to his neighbor's house. But if he neglects to give notice, and undertakes to secure the building himself, and in so doing is guilty of negligence or unskilfulness, he will be responsible for such damages as naturally and necessarily flow from his default.

You will apply these principles to the case under consideration.

Did the plaintiff sink his foundation to the proper depth, in view of the character of the surface and soil of his own and the defendants' lot, and did he build his walls of sufficient dimensions and materials, and in a workman-like manner? If he did not he cannot recover.

Had the plaintiff notice or knowledge of the approaching danger in time to take the necessary measures to protect his own wall from injury? If he had, and failed to do so, the defend-

ants were not bound to underpin the building at their own risk and expense, but might proceed with ordinary care and skill, prudence and diligence, in the excavation of their land to a reasonable and proper depth, and in so doing, would not be responsible for any injury to the plaintiff's building arising therefrom.

But if the defendants undertook to underpin, or otherwise secure the plaintiff's building for him, and thus put him off his guard, they were bound to use due and ordinary skill, prudence, and diligence by the usual and ordinary means, to accomplish that object; and if they were guilty of negligence in so doing, they are responsible for such damages as naturally and necessarily resulted from their default.

If the plaintiff knew of the danger, and joined with the defendants in their endeavors to prevent the threatened injury, and concurred in the plan adopted for that purpose, the defendants are not responsible for any damages the plaintiff may have sustained. Or if, after the work was done, he approved of it, and expressed himself satisfied with it, being fully acquainted with the plan and manner of execution, he cannot recover. For, if a man assents to the doing of an act, he cannot afterwards bring an action and recover damages for it.

1. Your first inquiry, then, will be, did the plaintiff do all the law required of him, when he erected his house. If not, your verdict will be for the defendants.

2. Did the defendants do all they were bound to do? If they did not, and if the plaintiff was in no default, they will be responsible, and the plaintiff will be entitled to your verdict. But if they did, they are *not* responsible, and the plaintiff cannot recover. It would be considered, in law, one of those unavoidable accidents, for which no one is responsible, and must be borne by him on whom it falls.

3. Did the plaintiff approve of the plan adopted by defendants to save his house? If so, he is not entitled to recover. It was an error of judgment common to both parties, for which no action will lie.

4. Did the injury arise from the water of the hydrant, or elsewhere? If it did, the plaintiff cannot recover.

5. But if you will find all these questions of fact against the defendants, your last inquiry will be, what amount of damages necessarily and naturally resulted from the negligence and misconduct of the defendants. The damages can only be compensatory. The case is submitted to your determination, under the law we have laid down.—*Pittsburg Legal Journal*.

INDEMNIFYING BOND. EVIDENCE. PRIORITY OF LIEN.

Smiley v. Deskins, &c.

Circuit Court of Floyd County, Va. September Term 1858.

In an action on an indemnifying bond, the *gist* of the action is the relator's right to the property levied upon, and any evidence, tending to overthrow his right to the property, is admissible.

In such action the defendants offer evidence, tending to shew that when the sheriff seized the property by virtue of the execution, recited in the bond, he had older executions in his hands, which were liens upon the property, claimed by the relator, and to the satisfaction of which older executions the proceeds of the sale were applied; such evidence is admissible as tending to show that the relator had no right to the property, but that the right of property was in another.

In such case the relator is entitled to any surplus of the proceeds of the sale. But it is not a legitimate enquiry to ask whether there was not enough of *other* property of the defendant in the executions to satisfy the older executions; *all* the property being subject to the lien of the older executions.

This was an action of debt on an indemnifying bond, in the name of *Shelor*, sheriff of Floyd, at the relation of *Smiley* vs. *Deskins & Gill*. The declaration was in the ordinary form, and the plea was *conditions performed*.

Poage & Lane for plaintiff.

Staples for defendant.

It appeared that in the early part of 1856, *Francis Allison* sued out an execution for a large amount against *R. L. Toncray*, and the defendants *Deskins & Gill* as *Toncray's* sureties in a forthcoming bond. This execution was levied upon a large amount of property belonging to *Toncray*, among which was about seventy tons of pig iron. The relator claimed that he had bought *eight tons* of this pig iron from *Toncray*, prior to the issue of the execution; and it was in regard to this *eight tons* that the indemnifying bond had been demanded and given.

The relator introduced evidence, tending to show that he had bought eight tons of iron from *Toncray*: that it had been weighed out to him, and laid by itself, and that he had paid for it. Among his witnesses was the sheriff by whom the execution had been levied, and who had sold the iron, upon the indemnifying bond being given. On cross-examination, the defendant's counsel asked the sheriff this question: "At the time you sold this property, did you not have a number of other executions against

Toncray, which issued before *Smiley* bought the iron, and had they not been levied on the iron, and did not the proceeds of the sale go to satisfy the older executions?" and at the same time the counsel exhibited several executions, stating them to be the older executions on which he relied, and which he offered to place in the sheriff's hands.

Poage objected to the admission of this evidence. He contended that the enquiry ought to be confined to the question whether *Allison's* execution was a lien on the property, and whether the relator had good title to the property as against *that* execution. That was the execution recited in the condition of the bond, and it was to make the property subservient to that execution that the bond had been given. It was immaterial whether other creditors of *Toncray* had liens on the property; and it would only embarrass the enquiry and mislead the jury to go into an examination of other people's rights.

Staples contended that the question was whether the relator had any right of property in the goods, and any evidence was admissible which tended to destroy his right of property. Suppose *Toncray* had given a deed of trust upon this property, or made any other disposition of it before the sale to *Smiley*; surely we could read that deed or prove the other disposition, so as to show that the relator did not acquire any right of property by his purchase. An execution levied is a lien on goods and chattels; and if they were subject to such lien at the time the relator bought them, no right passed to him.

FULKERSON, J, (sitting for Judge FULTON.)

A little attention to the allegations upon which issue is joined in this case, will suffice to answer this question. The very gist of the declaration is that the relator had the *right of property* in this iron: that it was a part of *his* goods and chattels. Now he is bound to prove this, and has introduced evidence tending to prove it. Any testimony tending to defeat this assertion of right of property in the relator, is admissible. Now, we all know that an execution is a lien on the goods upon which it is levied; and that a private purchaser cannot obtain a good right as against such a lien. If this iron had been levied on by executions older than *Allison's* prior to the time the relator bought it, and those executions were unsatisfied when the relator so purchased it, the *right of property* did not pass by his purchase. *Toncray* did not have such right, and could not sell it.

Of course if there was any surplus left after satisfying those older executions, the relator would be entitled to it; and in that point of view it becomes material to enquire as to the application of the proceeds of sale. The evidence must be admitted.

A number of executions, which had been issued and been levied on the iron, were then read to the jury, and the sheriff stated that he had applied the proceeds of sale to the older executions. The plaintiff's counsel then asked the officer this question: "Did not *Toncray* have enough of other property to satisfy those older execution, without interfering with this parcel of iron?" To this question the defendants objected.

FULKERSON, J.

I do not think this question is legitimate. The sheriff has stated that he had levied the older executions upon this very parcel of iron. It is admitted that those older executions were liens on the iron. Such being the case, the officer had the right to sell *any* property on which he had valid process. He was not bound to make any election. Having levied the older executions upon this particular parcel of iron, he could not be called upon to abandon that levy and seize other goods. At the most, if any wrong has been done to the relator he must look to the officer alone. As against the defendants he must show right of property in himself; and he cannot hold them responsible for the officer's acts. I cannot permit this question to be answered.

The jury found—for the defendants.

COURTS AUTHORITY. PROSECUTION.

Commonwealth v. Iddings.

Circuit Court of Floyd County, Va. September Term, 1858.

The court may order a person to be set down as a voluntary informer and prosecutor, though not so stated to be by the Grand Jury, at the foot of the indictment.

Parol proof is sufficient to justify the court in ordering a party to be set down as prosecutor; nothing to the contrary appearing in the indictment.

At September Term, 1857, an indictment was found against *Anderson Iddings*, charging him with an assault upon *Catherine*

Lykins. The entry at the foot of the indictment was in these words: "Upon the evidence of *Catherine Lykins*, sworn in court, to give evidence to the Grand Jury."

The defendant took out a rule against *Lykins*, to show cause why she should not be set down as prosecutrix, and required to give security for the costs.

Banks for the Commonwealth.

Staples for the defendant.

The 3rd section of chapter 207, page 769, of the Code, was referred to as giving the authority of the court in the premises. *Dove's* case, 2 Virginia Cases, 29, was also referred to, as shewing under what circumstances the power of the court may be exercised.

FULKERSON, J. (holding the court in place of Judge *Fulton*.)

I think the court has power to order a party to be set down as prosecutor, *after* the indictment has been found, although the language of the Statute is "when it is found." I think those words refer only to the case in which it is known, at the time of making the indictment, that there is a prosecutor; and that they are not intended to exclude the power of the court in a case where it is found out, subsequently to the finding of the indictment, that it was moved by a voluntary informer.

The only doubt I had was as to the question whether parol proof is admissible to show the fact that the prosecution was moved by a voluntary informer. The Grand Jury only state that this woman was "sworn in court," to give evidence; but they do not state the character in which she appeared. In *Dove's* case the General Court decided that parol proof to show the person who instigated the prosecution, was inadmissible *after verdict*: but there is nothing to show that the proof may not be heard in some preliminary stage of the case. I think, therefore, that I must hear the parol proof, as to this woman's action in this case.

The proof was introduced; but in the opinion of the court, did not show that the woman was a voluntary prosecutrix, and the rule was, therefore, discharged.

FOREIGN GOODS. TIME OF VALUATION. CUSTOM HOUSE.

W. H. Forman v. Chas. H. Peaslee.

The plaintiff entered into a contract with T. & Co. for the transportation of iron from Wales to the United States, in pursuance of which, T. & Co., employed coasting vessels to bring it from Wales to Liverpool, where it was transhipped on board their packets for Boston. *Held*, that the "period of exportation" at which the market value was to be ascertained, under the act of 1851, was the time when the goods left Liverpool for the United States.

Grant v. Peaslee, 2 Curtis C. C. R. 250, distinguished.

The cost of transportation from Wales to Liverpool is not a dutiable charge which can be added to the market price.

By the act of March 3, 1851, 9 Sts. at Large, 629, all goods subject to an *ad valorem* duty are to be appraised at the period of exportation, and this includes goods obtained otherwise than by purchase.

The 17th section of the act of 1842, 5 Sts. at Large, 564, must, since the passage of the act of 1851, be held to point out the mode and consequences of all appraisements of imports, whether procured by purchase or not.

CURTIS, J.

This is an action against the Collector of the Port of Boston and Charlestown, to recover back moneys paid under protest for duties on an importation of railroad iron, manufactured by the plaintiff in England, and exported by him to this country, to be sold here on his account.

It appears that the plaintiff made a contract with Train & Co., who had a line of packet ships plying between Liverpool and Boston, to transport this iron from Wales, where it was manufactured, to Boston, at a freight of twenty-two shillings and sixpence per ton. Train & Co. employed coasting vessels to take it on board at the ports of Newport and Cardiff, in Wales, and bring it to Liverpool, where it was laden on board their packet ships and brought to Boston. In appraising the iron, the appraisers fixed its market value at the time of its departure from Liverpool. The plaintiff insisted it should be at the time of its departure from Newport and Cardiff; and protested for this cause against the payment of the duties exacted by the Collector.

The act of March 3, 1851, sec. 1, (9 Sts. 629,) requires the appraisers to ascertain the market value of the import, "at the period of the exportation to the United States."

The natural meaning of the words "period of exportation," is termination of exportation. The period of exportation is that

point of time when the act of exportation is complete. The subject matter of the statute is the appraisal of goods exported from a foreign country and imported into the United States. So that the inquiry in this case is, At what point of time was the act of exportation of this merchandise from the foreign country, England, complete? My opinion is, when it left Liverpool. Its transportation coastwise from one English port to another was not an exportation from England. Until the vessels of Train & Co. having it on board were cleared and sailed from Liverpool, there was no completed act of exportation. Until that time the property was under the control of the British government, whose order could have arrested and detained it within that country, and whose control over it would have been unaffected by the fact that it had been brought from Cardiff and Newport for the purpose of being sent to the United States.

The plaintiff's counsel relied on the case of *Barrett vs. The Stockton and Burlington Railway Co.*, reported in 2 Man. & Gr. 134, and on error in 3 M. & G. 956, and 11 Cl. & Fin. 590. But that case tends to support the construction which I place on the act of congress. It is true it was decided in all the courts that under the act of parliament then in question, exportation might mean simply carrying out of a port; and as between the public and a corporation claiming a toll, and upon the special provisions of the act, it was held it did mean so. But it was admitted that its more usual sense was a more restricted sense, and covered only cases where property was not merely sent out of one port to another of the same kingdom, but carried to a foreign country.

And that such is the meaning of the word exportation in this act of congress can admit of no doubt, for it can have no reference to transportation from one port to another of the same country; its language and its object and its subject matter all confine the exportation here spoken of to an exportation from some foreign country to the United States.

But it is further argued that the merchandise left Wales for the United States, and under a bill of lading which showed that it was to come hither. The bill of lading, if it can be considered as but one, which I doubt, and the intent of the party in sending the property from Wales, cannot make the act of exportation from Great Britain complete on leaving Wales, when it was not so in fact.

It is further insisted that this case is like *Grant v. Peaslee*, 2 Curtis's C. C. R. 250. But this is not so. Goods, the produce of Turkey, were exported from that country to the United States. On their way hither they were carried to England, and without being landed were transshipped. I held they were not imported

into the United States from England. Their going to England and being transshipped there affected only the route and means of their transit after the act of exportation from Turkey had been completed. But here the fact that this merchandise went to Liverpool and was there transshipped, affected the mode and time of transit out of Great Britain, and prevented that from being complete until the merchandise left Liverpool.

The next objection is that the collector added to the charges six shillings sterling per ton for the cost of transporting the property from Wales to Liverpool.

I am of opinion this was illegal. There was no such charge in fact. The plaintiff agreed with Train & Co. a certain rate of freight from Wales to the United States. It does not appear that he paid any more freight because Train & Co., instead of sending their ships to Newport and Cardiff, chose to bring the iron in other vessels to Liverpool. It appears that the market price of railroad iron is always quoted, and was so taken by these appraisers, at so much per ton "free on board in Wales." So that from the nature of the trade no charges which precede the shipment are to be added to the market price. They are included in that price, and are borne by the seller. That marine freight, whether an import be brought direct from the country of exportation or *via* other ports and places, is not a dutiable charge, has been repeatedly held. *Grant v. Peaslee*, 2 Curtis's C. C. R. 250; *Millar v. Millar*, *Ib.* 256.

The next objection involves a question of much importance, and which is attended with no little difficulty. It is, whether these goods, having been procured otherwise than by purchase, were rightly appraised by pursuing the course marked out by the 17th section of the tariff act of 1842, (5 Sts. at Large 564,) as amended by the act of March 3, 1851, (9 Sts. at Large 629,) or whether it was necessary to conform to the act of March 1, 1823, (3 Sts. at Large 729.)

This question affects, first, the point of time at which the value should be ascertained; second, the persons by whom the appraisement should be made; third, the consequence of the appraisement as respects the additional duty by way of penalty.

As to the first of these, it is insisted by the plaintiff, that as these goods were procured otherwise than by purchase, their actual value at the time and place when procured, and not their market value at the period of their exportation, should have been ascertained, pursuant to the fifth section of the act of 1823, (3 Sts. at Large 732.) Independent of the first section of the act of March 3, 1851, (9 Sts. at Large 629,) this position would probably have been held to be correct. But the language of that section is, "in all cases in which there is or shall be impos-

ed any *ad valorem* rate of duty, &c., it shall be the duty of the collector, &c., to cause the actual market value or wholesale price thereof at the period of the exportation to the U. States, in the principal markets of the country from which the same shall have been imported in the United States, to be appraised, estimated and ascertained." This language is broad enough to cover cases of imports procured otherwise than by purchase. It expressly embraces all cases of imports subject to an *ad valorem* rate of duty. And when it is added that this law is known to have been passed to change certain rules decided by the Supreme Court in *Greely v. Thompson*, 10 How. 225, and that that was a case of goods not purchased, there can be no doubt that congress intended to embrace such cases and change the rule of the act of 1823, and bring them all under one uniform rule as to the time in reference to which the value should be fixed.

The second particular, viz: the person by whom the appraisal is to be made, is attended with more difficulty. The sixteenth section of the act of 1823 required the President to appoint two appraisers for each port therein mentioned; and the eighteenth section provides for a re-appraisement by two merchants chosen by the importer, together with the two government appraisers; and also, a further appeal to the Secretary of the Treasury.

The 17th section of the act of 1842, (5 Sts. at Large 564,) points out the mode of proceeding by the government appraisers, confers on them certain special powers to enable them efficiently to discharge their duties, and gives an appeal to two merchants, to be chosen by the collector. This was the mode followed in present case; and it is insisted that it was illegal, because this section applies only to the appraisement of goods purchased.

It is said that in *Greely v. Thompson*, the Supreme Court so viewed this section, and that this court followed this view in *Barnard v. Morton*, 1 Curtis's C. C. R. 410. I think this is so. But in neither of these cases was this point necessarily involved in the decision, nor does the question whether the seventeenth section of the act of 1842 is restricted to cases of imports procured by purchase, appear to have been examined and carefully considered. Still, I should follow what is said in *Greely v. Thompson*, if I did not think the subsequent legislation, in the act of 1851, had a most material bearing on the question. I proceed, therefore, to examine it.

There can be no doubt that the sixteenth section of the act of 1842 applies only to goods purchased. It may be admitted, also, that the mode and means of appraisement provided in the seventeenth section, had reference more immediately and prominently to the cases embraced in the sixteenth section. But the question is whether they extend to no other cases.

The language is broad enough to include all cases of merchandise requiring an appraisal. "It shall be lawful for the appraisers, &c., to call before them and examine upon oath or affirmation any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of *any merchandise imported*," &c. The subject of the appraisement is any merchandise imported. The purpose of the appraisement is to ascertain the actual market value; and by the act of 1823, sec. 5, the actual value, which means the same thing, was to be ascertained.

The mischief to be remedied was the same. No reason is perceived why it was not as necessary to give the appraisers these new powers in reference to importations of goods manufactured or produced, as well as goods purchased by the importer. Indeed, where there was an actual purchase, there would seem to be less danger of undervaluation than where no actual transaction had occurred to fix the market value of the particular goods. Upon mature reflection I should feel great difficulty in holding that this new and more efficient mode of appraisal, which in terms is extended to any merchandise imported, was designed to include only goods purchased. And the act of March 3, 1851, passed after the decision of *Greely v. Thompson*, tends strongly, in my judgment, to show that the seventeenth section of the act of 1842 must now be construed to include all cases of appraisement.

It has already been stated that the first section of that act extends to and includes goods procured otherwise than by purchase. The second section also applies to all cases of appraisement, and makes the certificate of one appraiser sufficient.

The third section provides for the appointment of general appraisers, who are to visit such ports as may be designated by the Secretary of the Treasury, to give aid and assistance so as to secure uniformity in the collection of the revenue; and it proceeds—"and wherever practicable, in cases of appeal from the decision of United States' appraisers under the provisions of the seventeenth section of the act of 1842, the collector shall select one discreet and experienced merchant to be associated with one of the appraisers to be appointed under this act, who together shall appraise the goods in question; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final, and deemed and taken to be the true value of the said goods, and the duties shall be levied thereon accordingly, and any act of congress to the contrary notwithstanding."

Now it is, to say the least, highly improbable that congress

would by the first and second sections of this act embrace all cases of importations calling for an appraisement, and change the rules as to the time of valuation and the number of appraisers required in all, and yet, when they came to these new and important provisions to secure uniformity of valuation, leave out of their operation all cases where goods were procured otherwise than by purchase. And yet they have done so if the seventeenth section of the act of 1842 does not include those cases. For they extend the new provisions only to appeals which are claimed under that seventeenth section. In my judgment this has a very strong tendency to show that the seventeenth section was intended to embrace, and does embrace, all cases of appraisements of goods, however the same may have been procured. And as these acts are *in pari materia*, and each is to be construed by the aid of all the light which can be obtained from all the rest, I shall hold, until otherwise instructed by the Supreme Court, that the seventeenth section of the act of 1842 points out the mode and the consequences of an appraisement of goods procured otherwise than by purchase.

And this determines the remaining question, whether any penalty was incurred when it was found that the appraised value exceeded the invoice value ten per centum.

As the seventeenth section of the act of 1842, in my opinion, applies to the case, and as the penalty fixed by that section was the one exacted, there was no error, save that the penalty was assessed on the charges; it was, in that particular, not warranted by law.

The result is, that the plaintiff is entitled to recover back the six shillings per ton added to the valuation as a charge, and such part of the penalty as was assessed on the charges. For this, when computed, a verdict will be entered, as was agreed by the parties.

Choate and Griswold, for the plaintiff.

Hallett, District Attorney, contra.

[*Monthly Law Reporter.*

SLAVES ELECTION TO BE FREE.*

Cox's ex'or v. Ellen et als.

In the Circuit Court of Henrico County, Virginia.

A slave is left to A or B, whichever may choose to take her, until she is twenty-five years old, having during that time certain privileges, then to be liberated according to the laws then in existence, or if she choose she may remain with the person she chooses. The bequest states that the testator is well aware the slave can not enjoy the privileges of freedom, in this State, but that it is more than probable that before she arrives at the above named period, she will be married, and in that case her husband may choose to purchase her, the proceeds of such purchase to go to the person who keeps her. *Held*, the slave is free at the age of twenty-five years, and may sue for her freedom twenty-five years afterwards and obtain it, though never claiming it before, notwithstanding she was aware all along of the provisions of the will, and had selected a master.

The case was substantially as follows :

A woman of colour, named Ellen, calling herself Ellen James, with her children, Margaret, Emily, Ella, and Robert, (all of whom were under age,) set up a claim for freedom under the will of Mrs. Elizabeth Janney, deceased. The provision in Mrs. Janney's will, upon which the claim for freedom was founded, was in the following language : " My maid Ellen, to whom I am much attached, I leave to my daughter, Mary Lorton, if she feels inclined to take charge of her for my sake ; if not, I request my daughter Margaret to keep her, and fulfil the following conditions, which are intended to be equally binding on either, viz : that she be allowed to go to a house of worship and hear preaching whenever she wishes it ; and that at twenty-five

* The recent decisions of our Court of Appeals, in *Bailey v. Poindexter and Williamson & als. v. Coalter's ex'r*, in relation to the capacity of our slaves to elect to be free, when the option is given them by will, has caused us to examine the records to get at some of the cases involving that question, which either because they were denied an appeal, or because they were not considered of sufficient importance to report are not to be found in the books. In our last number we reported a case of that character, in which an appeal had been denied. The case of *Cox's ex'or v. Ellen* is of a similar character. The learned counsel for the executor took it for granted as a settled rule of our Court of Appeals that a slave has the right of election. We do not quarrel with the recent decisions ; upon the contrary, they entirely accord with our view of right and justice, and the policy of our laws, but we must submit that they present a slight suspicion of special pleading, when we come to examine authority.

years of age, should she survive that period, she is to be liberated according to the law which is then in operation, and to receive annually twenty dollars, or if she chooses to remain with them, she may then have ten dollars annually. I am well aware she cannot enjoy the privileges of freedom in this State, but it is more than probable that long ere the period above particularized, she will be married; and in that case her husband may choose to purchase her, and then there will be no farther difficulty. In that case, her wages may cease, if she appears to be doing well, and is kindly treated by her husband, who must not be required to give an exorbitant price for her, the amount of which sale the person who keeps her, and is kind to her, until that period, is best entitled to, and now receives my thanks for the same."

Mrs. Janney died on the 16th of March 1832, and the girl Ellen was then about 21 or 22 years of age, and was informed a few days after the death of her mistress, of the provisions of the will in her favor. The will was read to her, and there were repeated conversations upon the subject afterwards, in the presence of Ellen, subsequent to Mrs. Janney's death. Her daughter, Mrs. Mary Lorton, did not take charge of Ellen, but she went, of her own accord and choice, to live at the residence of Dr. Samuel Pleasants, the husband of Mrs. Margaret Pleasants, the other daughter of Mrs. Janney. After she had gone to reside with Dr. Pleasants and his wife, she told their son, William H. Pleasants, that she had chosen him as her master; and that she had done so, was proven to have been the understanding in the neighbourhood, and in the family. When she was about 28 years of age, certainly over 25, she applied to Wm. H. Pleasants to sell her to the testator, Edward Cox, deceased, who owned the husband of the said Ellen—in consequence of this request, she was sold to Mr. Cox for \$500, and a bill of sale given him on the 9th day of July 1839, by Dr. Pleasants, the father of the said Wm. H. Pleasants, who was then under age; but he was nevertheless allowed by his father the benefit of the money. Ellen afterwards continued in the service of Mr. Cox, as his slave, with her children, all of whom were born after he bought her, until his death in 1853. After the death of Mr. Cox, his executor, Henry Cox, offered Ellen and her children for sale, as slaves, at public auction, with other property of the deceased. They brought in the aggregate near \$3,000. Until after the sale, the said executor had heard nothing about her claims to freedom, but being informed of this claim in the evening of the day of the sale, the circumstance was made known to the purchasers, and they refused to take the negroes. After which, proceedings to assert her claims to freedom, were commenced in

her behalf. Dr. Pleasants and Mr. Edward Cox, the purchaser of Ellen, lived near neighbours to each other; and by the will of Mr. Edward Cox, the husband of Ellen is emancipated, if he chooses to accept his freedom, which he has chosen to do; but neither Ellen nor her children are emancipated by said will. It was also proved that Ellen was an intelligent negro, although unable to read or write. The case was tried before a jury, and on the 9th of March 1855, they rendered a verdict in which they found the petitioners were "free." During the proceedings in the case, on the 2d of February, and on the 30th of Oct'r 1854. A. B. Hutcheson, sheriff of Henrico County was instructed to hire out the petitioners and required to take bonds for their hire.

A new trial was asked for on the part of the defendant, Cox, but the court refused to grant it, and thereupon a petition for an appeal was submitted to the Supreme Court of Appeals, which was unanimously refused.

Crane for petitioner.

Morson and Flournoy for Cox's ex'or.

U. S. COURT JURISDICTION. CITIZENS OF DIFFERENT STATES.

*Samuel P. Tuckerman v. Abraham O. Bigelow et als.**

In the Circuit Court of United States. Massachusetts District.

A citizen of New Hampshire cannot maintain a suit in equity in the Circuit Court of the United States for the District of Massachusetts, against a citizen of Vermont, although another of the defendants be a citizen of Massachusetts.

CURTIS, J.

This case came before the court on a demurrer to the bill taken by one of the defendants, a citizen of New Hampshire, and which assigned for cause that he was not a proper party. On looking into the bill it was found that it was brought by a citizen of the State of Vermont against a citizen of the State of Massachusetts and two citizens of the State of New Hampshire.

* Massachusetts Monthly Law Journal.

Upon a suggestion by the court to that effect; the question whether the court can exercise jurisdiction over the two citizens of New Hampshire in this suit by a citizen of the State of Vermont, has been argued by counsel.

The eleventh section of the judiciary act of 1789, 1 Sts. at Large 78, requires the suit to be between a citizen of the State where the suit is brought and a citizen of another State; consequently the complainant, a citizen of the State of Vermont, could not sue the two defendants, who are citizens of the State of New Hampshire, in this court, in the State of Massachusetts, and the fact that a citizen of the State of Massachusetts is also joined with them as a defendant, does not enable this court to take jurisdiction over the citizens of New Hampshire. *Strawbridge v. Curtis and al.*, 3 Cranch 247, has not been overruled, and the law requires each plaintiff to be competent to sue each defendant over whom the court is asked to exercise jurisdiction.

Nor has the first section of the act of February 28, 1839, 5 Sts. at Large, 321, nor the 47th rule for the equity practice of the Circuit Courts, dispensed with this requirement. This act does not relate to persons who have been served with process, or who voluntarily appear in a suit. Its only purpose was to enable the court to proceed in certain cases, as between parties properly before it, and over whom the court had jurisdiction, although other parties might be out of the reach of process. It does not extend the jurisdiction of the court over parties not previously within its jurisdiction. *Commercial Bank of Vicksburg v. Slocumb*, 14 Pet. 60; *Shields v. Barrow*, 17 How. 141. And the same is true of the 47th rule: "This was only a declaration, for the convenience of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of the Supreme Court on the subject of that rule." *Shields v. Barrow*, 17 How. 141.

I am of the opinion the bill must be dismissed, as against the citizens of New Hampshire, for want of jurisdiction. Whether the subject matter of the bill is such that the court can proceed to a final decree, as between the complainant and the citizens of New Hampshire, or whether the citizen of Massachusetts is competent to represent those rights, the complainant must consider. If not, no decree can be made, and the bill must be dismissed as against the Massachusetts citizen, for want of necessary parties.

H. M. Parker, for complainant.

J. C. Dodge, contra.

HABEAS CORPUS. WITNESS'S PRIVILEGE. JUSTICE'S POWER TO CALL AND EXAMINE WITNESSES.

In the Circuit Court of the City of Richmond. Vacation—before MERRITT, J. Sept. 1858.

Ex parte Pryor.

A single justice has a right, on complaint, to compel the attendance of a witness, in order that he may ascertain whether any criminal offence has been committed within his jurisdiction, and if such witness refuse to answer any legal question, the justice has the power to commit him for contempt. The justice must set forth in his warrant of commitment, the specific cause of such commitment.

A circuit court has a right to review and reverse the decision committing such witness upon a writ of *habeas corpus*; and if it shall ascertain upon an examination of the return to the habeas corpus setting forth the warrant of commitment, and the causes and reason thereof, that the questions, for refusing to answer which, the witness was committed, were such as he ought not to be compelled to answer, by reason of any privilege he may rightfully claim, the circuit court should discharge the witness.

When a witness under oath, refuses to answer a question, upon the ground that his answer may subject him to a criminal prosecution, the court should, before it compels the witness to answer, see that the direct answer to the question could not criminate him, either directly or by aiding the prosecution to obtain other evidence which might lead to his criminalation. But if the direct answer may criminate the witness, he is not bound to answer it, and the court will not compel him to do so. In coming to a conclusion upon the legality of such a question the court should pay much regard to the oath of the witness unimpeached, and unless it clearly sees from the circumstances developed in the course of the examination that the witness is in error with regard to the effect of his answer, or is trifling with justice or discredits himself, should not compel him to answer. But the court, as in every other question of evidence, is the sole judge of the legality of the question propounded, and of the right to compel an answer.

The act of Code of Virginia, ch. 199, § 22, p. 752, which provides that in a criminal prosecution evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, does not deprive the witness of his common law right to refuse to answer any question which may subject him to a criminal prosecution; but is designed to protect a witness against statements made by him upon a legal proceeding, either through ignorance of his rights, or inadvertence or voluntarily. But is not intended to enlarge the power of the courts to compel a witness to disclose any matter which before its enactment he had the right to withhold.

On the 18th of September, 1858, two justices of the county of Henrico, John O. Taylor and Jacob S. Atlee, summoned before them certain witnesses, to be by them examined in order to ascertain whether a duel had been fought in said county between O. J. Wise and Sherrard Clemens. Roger A. Pryor was the first witness called to the stand, and upon the decision of the questions arising in his case the cases of the other witnesses standing in the same category were decided.

After being sworn, the following questions were propounded to him by the justices, some of which, as will be seen, he answered, and others he declined to answer. The alleged duel was supposed to have been fought on the morning of the 17th September.

John B. Young, for the Commonwealth.

Geo. W. Randolph and *Wm. H. Lyons*, for witness.

Q. Did you see Mr. Clemens on the 16th?

A. I did.

Q. Where did you see him?

A. At the Central Hotel.

Q. Did you see him more than once on that day?

A. I did.

Q. Who was with him when you first saw him?

A. I decline to answer, because by doing so I may subject myself to a criminal prosecution.

[Mr. Pryor stated that as he was not a lawyer he should be compelled to rely upon his counsel in answering the questions propounded to him, as to how far he might go without subjecting himself to criminal prosecution, but in doing so, he did not wish it to be inferred that he was guilty of any crime.

Mr. Young insisted upon an answer, not being able to see how it could possibly involve the witness in any manner.

Mr. Randolph thought the witness right in not answering, because by so doing he might involve himself. If that question were answered, the attorney might follow it up, by asking "Who were the other parties?" and thus draw from the witness facts that might tend to criminate himself.

After a brief discussion, Mr. Young waived the question for the time, and proceeded with the following:

Q. Did you see Mr. Clemens on the night of the 16th inst.?

A. I did.

Q. Who were then present?

A. None others than him and myself.

Q. Did you see Mr. Clemens on the morning of the 17th?

A. I decline to answer, because it may subject me to a criminal prosecution.

Mr. Young insisted upon an answer to the question, declaring that he intended to follow it up with another: "Where did you see him?"

Mr. Randolph thought the question an improper one, as by compelling the witness to answer, the fact might be brought out that a duel had been fought, and that the witness was an accessory to the fact.

The justices decided that the witness must answer; and on his declining to do so, his further examination was postponed until Monday morning.

On the following Monday the witness, Pryor, still refusing to answer the question propounded to him by the attorney for the Commonwealth, the justices issued their warrant of commitment for contempt, setting forth their reasons for such commitment, and he was committed by the sheriff. Pryor immediately made application for and obtained from Judge Meredith a writ of *habeas corpus* to test the legality of his detention. The return to the writ set forth the commitment and the causes thereof as above stated, and was partially argued the same day.

Randolph in opening the case for witness, contended:

1st. We object *in limine* to the right of the justices when sitting as a mere inquest, to compel the witness to answer any questions whatever. The statute under which they are proceeding authorizes them on a complaint of a criminal offence "to examine the complainant and any other witnesses," and if they believe that an offence has been committed they may issue their warrant for the arrest of the person accused, "and in the same warrant may require the officer to summon such witnesses as shall be therein named."—Code, ch. 204, § 2. No authority is given to summon witnesses before a warrant is issued for the arrest of the supposed criminal. All who testify previously are voluntary informers, and are classed by the statute with the complainant. Such is the construction of the act in Mayo's Guide, p. 50, where the author says that "it is the duty of the justices to examine the complainant and such witnesses, if any, as he may produce." It could not have been intended to vest in a single justice inquisitorial power as extensive as that conferred on grand juries.

2nd. If the justices have the power to coerce answers under ordinary circumstances they cannot where the witness states under oath and *bona fide*, that his answers will tend to criminate himself, unless the justices see that such cannot possibly be the case. The general principle will be found stated in all the elementary writers who treat of the subject, and in numerous decisions both in England and in this country. See particularly 1

Greenleaf Ev. § 451; Story's Equity Pleading, §§ 524, 575; Powell on Evidence, 86 Law Library, p. 35; 1 Burr's Trial, p. 244; Rex v. Slaney, 24 C. L. R. 285; Regina v. Douglass 41, C. L. R. 110; Fisher v. Ronalds, 74 C. L. R. 761; Short v. Mercier, 1 Law & Eq. Rep. 208; People v. Matner, 4 Wend. 229; Bellinger v. The People, 8 Wend. 595; State v. Edwards, 2 Nott & McCord, 13; Howel's Case, 5 Grat. 668.

We propose from these cases to show the meaning and extent of the principle, and its application to the case at bar.

1st. We maintain that it not only protects the guilty person from furnishing evidence to convict himself, but also the innocent from communicating facts which may lead to unfounded accusation. To claim the privilege of declining to answer a question, because the answer may tend to criminate by no means implies conscious guilt. Chief Justice Marshall says that the witness should not be compelled to answer if it "may criminate him," 1 Burr's trial, 244. To criminate means "to accuse, to charge with a crime," and a person criminated is said by lexicographers to be one "accused, charged with a crime."—See Webster. Hence, if Judge Marshall's enunciation of the principle be correct, one may decline to answer a question when the answer "may accuse him of a crime," whether the accusation be true or false. In Fisher v. Ronalds, 74 C. L. R. 781, the syllabus of the case states that the witness is not bound to answer "where his answer may have a tendency to render him amenable to a criminal charge." Chief Justice Jarvis says: "you cannot by successive questions get enough from the witness whereon to *found a criminal charge*." Judge Story says that the witness is protected from making a discovery that "may subject him to a criminal prosecution."—Story's Eq. Pl. § 575. It is manifest from these and other authorities that the witness is protected from *the accusation* as well as from conviction.

2nd. He is protected not only from the *probability*, but from the *possibility* of criminal accusation. Judge Marshall says that he need not answer what "may" criminate, *may* signifies possibility, it means "to be possible." Judge Story says "may subject him," italicising the word "may," and following it up with the explicit addition "and not what *must* only." He uses the exact language of Lord Hardwicke in Harrison v. Southcote, 1 Atkyns, 539. The syllabus of Fisher v. Ronalds is that the witness need not answer "what *may* have a tendency to render him amenable to criminal charge."

3rd. It follows therefore that unless the court see that the answer *cannot possibly* criminate the witness he will be excused, for as long as the mind of the Judge stops short of this conclusion he is in a state of doubt, and would be compelled to decide

that the answer *may* criminate. It is the duty of the court to see clearly that the answer *cannot* criminate before coercing the witness to make it. If the court cannot respond in the negative to the enquiry whether the witness may be criminated or not, the question is referred to the witness himself, and if he under oath, answers in the affirmative, he is excused from showing how it may criminate him." You cannot, says Judge Marshall, "participate in the judgment of the witness without stripping him of his privilege." "We must allow the witness to judge for himself," says Chief Justice Jarvis in *Fisher v. Ronalds*. "I think the Judge is bound by the witness's oath," says Justice Maule in the same case. See also *State v. Edwards*, Nott & McCord 13; *Bellinger v. The People*, 8 Wend. 595.

4th. And the witness is not only excused from disclosing the *res gestae*, but any fact which may by its connection with the transaction tend to accuse him. "Any link in the chain of evidence," says Judge Marshall, "you cannot make him disclose." Otherwise, "you might," says Chief Justice Jarvis, "by successive questions, get enough to found a criminal charge, though no single question were asked which directly criminated."

We think, therefore, that the principle may be thus stated: A witness is excused from answering what may subject him to a criminal charge. It is the province of the court to determine whether the answer will or will not have that tendency, if the court think that it will *not* then the witness must answer, if the tendency of the answer be doubtful, and it may criminate, then the witness is the sole judge of the effect of his answer, if he says under oath that it may criminate him, he is excused from giving it.

Apply this principle to the case at bar, and it will appear not only impossible for the court to say that the answers *cannot* criminate the witness, but perfectly obvious how each of them might criminate him, if he were under prosecution for promoting the alleged duel, and the evidence were circumstantial. The answer to nearly every question may prove the fact that a duel was fought, or that the witness was in conference with one of the principals concerning a contemplated duel. The first fact would be essentially necessary in a prosecution against any one for the supposed duel, and the second would tend to connect the witness with it. The question as to who was present at the interviews admitted to have taken place between the witness and one of the parties, might bring out the names of persons who may testify against the witness, and thus the answer may tend to accuse him. The question as to the time at which he saw Mr. Clemens at the Central Hotel on the day of the supposed duel might disclose the fact that the witness was with Mr. Clemens

at an unusually early hour, so early that the visit could not have been one of courtesy or ordinary business. Would not this tend to prove complicity in the duel.

Without going over the questions *seriatim*, we submit that it is manifest how the answer to each might furnish facts pertinent and material in a prosecution against the witness, or the names of persons who could prove such facts, and therefore that the witness may criminate himself if he be compelled to answer them.

Young for the Commonwealth.

There can be no doubt of the right of the justices to summon a witness in reference to a criminal charge and compel him to attend and testify, before a warrant is issued. It would be astonishing if the law did not clothe the justice with this power, which is so necessary to his safe action. The testimony he is authorized to receive is not confined to the person who makes the complaint, but he is entitled "to examine the complainant and *any other witnesses*." The term "witness" implies some one who is not a volunteer, but is brought into court by a process. If Mr. Randolph was right a justice would in most cases be compelled to act on suspicion merely, in issuing his warrant, for in many cases the person who was cognizant of the facts necessary to authorize the warrant, would not voluntarily attend. In such cases the magistrate would be powerless and the offender escape. Accordingly we find that the law arms the justice with power to issue subpoenas for witnesses, to testify in behalf of any person, or in any case, or about any matter before him.—Code, ch. 176, §§ 20, 21, 22, 23, and to compel them to give evidence; and by ch. 211, § 2, these provisions are extended to criminal proceedings. The objection that the proceeding here is *ex parte* is equally applicable to all examinations preliminary to issuing the warrant, and would condemn the examination even of a witness who voluntarily attended.

2nd. The second question that arises is as to the power of the witness to decline to answer questions upon the ground that the answers may tend to criminate him. This is certainly a great power to lodge in the hands of a witness, as it may enable him to defeat the claims of justice, and its exercise can not be too cautiously guarded. From the nature of things it is liable to be abused by the most conscientious witness, under the influence of fear to himself or of mistaken impressions of criminal responsibility. The doctrines upon this subject, as laid down in England, and in the most authoritative decisions, in this country, never went to the extent contended for on the other side. The rule is clearly laid down in 2 Phillips on Evidence, ch. 9, § 11, p. 417-418. It is there distinctly declared to be the province

of the court to decide, whether the question has a tendency to criminate the witness; and I insist that such tendency must clearly appear from the question itself, or if not, the court must see from other questions, or from the developed facts of the case, that the position of the witness in relation to the alleged offence is such that an answer to the question may tend to criminate him. This power of the court is distinctly recognised in all the leading cases cited on the other side. Judge Marshall, in Burr's trial, exercised the power and compelled the witness to answer, though he claimed his privilege on oath; and it will be found upon examination of the cases, in which the privilege has been allowed, that it clearly appeared affirmatively that answers to the questions would tend to criminate. Such is the case in *Fisher v. Ronald*, 74 E. C. L. R. 762, in which it appeared that the witness was the lessee of a room in which there had been unlawful gaming, and the witness after proving that he was in the room on the night that the gaming was alleged to have occurred, was then asked whether "there was a roulette table in the room." The same will be found to be true in all the cases cited by Mr. R. The late case of *The Queen v. Garbet*, 5 Br. C. C. p. 236, is to the same effect, for in that case many questions were asked the witness, and one was put to him which directly imputed to him the crime of forgery, and the court below compelled him to answer. The decision was reversed upon the ground that it manifestly appeared that the answer would tend to criminate the witness.

The rule as laid down by Mr. R. leaves everything to the witness, for he insists that the court must allow his privilege unless it can see clearly that the answer *can not possibly* criminate him. Now it is impossible to apply such a rule as this. For how can the court say that an answer to any question, no matter how apparently unconnected with the crime charged can not possibly criminate. The most innocent question may *possibly* disclose such a fact if answered.

But whatever may be the rule in England and in other States, I insist that our statute especially modifies, if it does not repeal it entirely. By § 22 of ch. 199 of the Code, it is provided that in a criminal prosecution, other than for perjury, or an action under a penal statute, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination.

Whatever purpose the legislature had in passing this statute, it certainly has the effect of completely protecting the witness against any of his statements being used against him as evidence, and in that view obviates the very danger to which the witness was exposed at common law, and to protect him against which

his privilege was allowed him. The case of the Queen v. Garbet affords a striking illustration of this; for in that case the record of the statements of a witness made under oath on the trial of a civil suit was sought to be given in evidence upon his subsequent trial for forgery. This could never have happened here since our statute quoted above. And it will be found, upon an examination of the cases, that the protection of the rule applies when the fact stated by the witness has a tendency to criminate him, or may afterwards be introduced against him, which can never happen under our statute.

I insist, therefore, that in considering the privilege to which a witness is entitled in this State, we can not lose sight of this statute; and that its effect is to modify most materially, (if not totally repeal) the common law exemption. The court should see distinctly that an answer to the question would criminate the witness *in some other way* than by having the answer used directly in evidence against him, because, with us, this cannot be done. Indeed, it may well be questioned whether the rule, as laid down in the English cases was intended to apply to any other facts than those which might be given in evidence against the witness in a criminal prosecution. All the decisions speak of his exemption from answering upon the ground that the *facts* proved by him might prove one of a series of *facts*, necessary to his conviction; and so far as the cases go they do not seem to contemplate any exemption on the part of the witness, because his answers might possibly disclose collateral circumstances, by the aid of which, the officers of the crown might be enabled to convict him, in a subsequent prosecution, by means of the testimony of other witnesses, independently of his own confession.

If this be the true view of the English rule, there is no doubt that our statute would fully meet all the cases contemplated by it, inasmuch as no fact deposed to, or statement made, by the witness, no matter how conclusive of his guilt, can possibly be afterwards used against him. But even if the above position be not well founded; and even if the England rule would protect him from disclosing any facts, which, though not tending directly to implicate him, might nevertheless serve to point out to the prosecution other witnesses, who might be summoned to convict him, in a subsequent prosecution, it still seems to be apparent as above stated, that our statute protects the witness against most of the consequences, against which the English rule was intended to guard him, and that he ought not to be permitted to decline to answer the question, simply because the answer, if it could be used against him, would have a direct tendency to criminate him. It is submitted, on the contrary, that before granting him the privilege of refusing to answer, the court should

consider whether his answer would probably criminate him, in any other way *than by* being *used* as direct evidence against him, and unless so satisfied that it should disallow the privilege. If the above views be just, it would seem apparent that Mr. Pryor can claim no exemption from answering most of the questions propounded. For example—having stated that he had seen Mr. Clemens in Richmond, on the morning of the alleged duel, he was then asked where he had seen him. It is not perceived that the answer to this question could criminate him. For, suppose it answered according to the possible fact that he had seen him at the Central Hotel, and at an unusual hour in the morning. Inasmuch as the answer could not be used against Mr. Pryor and would disclose no collateral fact, he could not be jeopardized by it, while it would furnish a most important fact against Mr. Clemens. So, of the questions as to the statements of Clemens made to him since the duel, as to its having taken place. How could these statements probably affect the witness, if the detail of them cannot be used against him? Another of the questions is, whether the article, purporting to be signed by Mr. Clemens, and published in "The South" newspaper, after the duel, detailing his motives and action, in the circumstances which led to the difficulty between him and Mr. Wise, was so published by the authority of Mr. Clemens. It is submitted that no answer to this could affect the witness; and if he said that it might affect him by tending to prove the fact of the duel, the answer is that even if the duel be established in a prosecution against Mr. Clemens, the record in that case is no evidence against Mr. Pryor, in a prosecution against him as an accessory before or promoter of the duel, and inasmuch as his own statements, now made, in reference to that publication, can not be hereafter used against him, he can not possibly be affected, by proving that it was so published by authority of Mr. Clemens.

Upon the whole, I think it is apparent that in view of our statute, there must be, at least, a great modification of the English rule, and that the witness can not properly claim the protection he seeks.

M. Johnson, with *Young*, for Commonwealth.

The most important question before the court is, shall the witness be compelled to answer the questions which have been propounded to him? If the court be of opinion, as is contended on the other side, that the witness is to determine that the answers will criminate, or tend to criminate him, the question is at an end. I submit, however, that it is incumbent upon the court, and not the witness, to decide. In 2nd volume Philips, pages 417-18, in

evidence, it is laid down expressly to be the province of the court. In the trial of Bart, Chief Justice Marshall decided it to be the province of the court, and in that case did compel the witness to answer. In the case of *The People vs. Mather*, Judge Marcy, after attentively considering Judge Marshall's opinion, emphatically concurred with him in opinion. See also Wharton's Criminal Law, p. 372, and the case of *Ward v. The State*, 2 Missouri R., p. 98, where the same doctrine was held. In the case of *Fisher v. Renolds*, 74 vol. C. L. R., which is relied upon by the counsel on the other side, the question was not determined, because the judges say the question which the witness declined to answer was just such a question as would be propounded against him on a prosecution against him. But in the case of *Regina v. Garbett*, the judges certainly inclined to the opinion that it was their province to determine the question.

Taking the law then to be that the court will decide, what rule should the court adopt in determining the question?

I submit, that the answer of the witness should disclose some fact which would be evidence against him were he on trial, and not any collateral matter which may contain some remote suggestion which by possibility may start a prosecution against him. It cannot be the business of a court to go so far as to say that it will not compel the witness to say anything which possibly may suggest to somebody something which indirectly, and however remotely, may cause some one to institute a prosecution against him. Judge Marshall says, "If such answer may disclose a fact which forms a *necessary* and *essential* link in the chain of *testimony*, which will be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish *matter* for that conviction." In the case of *The People vs. Mather*, Judge Marcy says, "The court are to determine whether the answer he may give to the question can criminate him directly or indirectly, by furnishing evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of testimony sufficient to warrant his conviction, but which one fact of itself could not produce such result."—Showing that the answer must disclose some fact which could be introduced as evidence against him, were he on trial. And by reference to the case of *Ward vs. State*, it will be seen to have been expressly so decided.

If this be so, it is clear that the question must be answered.

Again: Whether this position be correct or not; will the court say that it must have reasonable cause to believe that

the answer will tend to criminate the witness? Or will it hold that the court must see that the answer cannot by possibility lead to its prosecution? If the latter, the privilege is unqualified and absolute, because it is impossible for the court to see that it cannot in some way or other lead to a prosecution against the witness. In the case of *Reg. v. Garbett*, the judges said they must have reasonable ground to believe that the witness would be criminated. 2d Phil. Ev., p. 418, it is said to be the duty of the court, while it protects the witness in the due exercise of his privilege, to take care that he does not under the pretence of defending himself, screen others from justice.

It may also properly be said of the English decisions that they do not apply with unqualified force with us, because there is no state in England which protects a witness from the use of his own statements against himself. On the contrary, several of the cases cited show that the evidence of a witness could be used in a prosecution against him. This is an essential difference between the laws of England and Virginia, and is reason why the privilege should be extended much farther in England than in Virginia.

With these views, and seeing no reasonable cause to believe that the witness will criminate himself, by answering the questions propounded. I submit, he should be compelled to do so.

Crump and *James Lyons* followed on behalf of the applicant.

At the conclusion of the argument upon these two questions, his Honor expressed a desire to hear counsel upon the question, as to whether he had authority upon a writ of *habeas corpus* to go behind the commitment of the magistrates, the case being that of a commitment for contempt. And the further hearing of the cause was postponed until the next day, in order to give time for an examination of the question.

Crump, for the applicant.

Upon the question, as to this court's power to revise and correct the order of the justices committing the witness for contempt, it is submitted that the true and most valuable function of the writ of *habeas corpus*, is to bring before a superior tribunal the propriety and justice of any imprisonment, and to release or bail the prisoner, as the case may require. The only exception which can be found to this bene-

ficent rule, exists when the law has provided another mode of revisal. Let it be ascertained that a citizen is in custody without trial by jury, and that the law has pointed out no specific mode of relief—by writ of error, or by appeal, and at once this writ comes to his aid and rescues him from the error, or the caprice, or the oppression, to which he has been made a victim. And inasmuch as our Code provides in terms for relief from imprisonment—if it be unjust—in every case but this, it is urged, that in so doing the legislature designed to leave redress in this class of cases, to be secured through the instrumentality of this great “writ of right.”

Originating in the common law of England—which was especially jealous of the personal liberty of the subject, it was made by the “petition of right,” 3 Car., 1, which arose out of Sir John Corbit’s case, 1 Roll., 219, Hawk., § 67, vol. 2, ch. 15; a shield against the power of the crown, and when by timid and obsequious judges its efficacy was impaired, it was rendered more effective by Stat. 16, Car. 1, ch. 10, until it became by 31 Car. 2, chap. 2, “another Magna Charta of the kingdom.” 3 Black., p. 134, chap. 8. Our own statute, modelled upon this last, and extending in very important particulars, its wise and salutary provisions is thus commented upon by Judge Allen, in 9 Grat. 103–4, “The provisions of the statute come in place of the common law, and as it was the leading intent of all the statute provisions on this subject to extend and simplify this great and efficacious remedy for all illegal confinement, the words of the statute should be liberally construed, so as to carry out that intent.”

In the light of this commentary, let the case before the court be considered.

The witness is committed—it is conceded—under § 23 of chap. 176 of the Code of Va., the provisions of which were extended to criminal cases by § 2 of ch. 211; and the power of the justice in this case to commit—it is also conceded—is shared with “arbitrators, an umpire, a coroner, a surveyor, a notary public, or any commissioner appointed by a court.” So that the commonwealth in this case, is driven to assume the proposition, and its representatives here do assert it, that whenever any one of the above named functionaries shall imprison a citizen for refusing to answer satisfactorily, any question propounded, however irrelevant, or insulting, or unlawful, no court in the commonwealth can afford relief; and that there is no escape from such imprisonment, except by death, or by submission to an unlawful exaction, and even this last may not suffice, for if the justice, or the notary, or

the surveyor, should not think the answer sufficient, he may still commit,—for the proposition here maintained is, that he is irresponsible to any human power, “lord of himself,” and the only single judge in the State from whose arbitrary edicts there is no appeal. It is difficult to reason upon a proposition like this,—so abhorrent to every sentiment of civil liberty, and so grossly and wickedly violative of all personal security. It is equally difficult to find a precedent to guide the court, if its mind is disturbed as to its power, for since the 1st Charles lost his head chiefly because he wantonly committed his subjects, and the courts would not enquire into the cause of commitment, until by the “petition of right” they were required so to do—precedents are rare; for this great remedial writ sought out, and investigated and relieved every case of illegal imprisonment—when no other method was provided by law—unchallenged.

It is said in Cro. Jac., 543, that the king has a right “to have an account why the liberty of any of his subjects is restrained;” and in Vaugh., 155, “if the cause of imprisonment was palpably illegal, they might discharge him.” See also, 9 Mod., 198; 1 Salkeld, 352; 2 H. P. C. 211. In Salk. it is said, that “the return is only an account or history of the proceedings stated and sent up to the superior court, to judge and determine the matter there.” How precise that account must be, is shown in 1 Ld. Rag’n, 65, King v. Kendal & Roe; 5 Mod. 85; 1 Bun., 155. And it is said in Bethell’s case, 1 Salk., 348, that “where a commitment was without cause, a prisoner may be delivered by *habeas corpus*,” and this was said of a conviction by a court of oyer and terminer. But it is not pretended that this court can look behind a conviction by a court of record—because in Virginia there is another remedy. The justice, however, sitting in this matter is not a *court* in the legal sense, nor is it pretended he is. Possessing a power for mischief unparalleled in a land of laws, the justice, and the surveyor, and the notary, and the arbitrator, have no records; their proceedings remain in their own breasts—they decide for themselves, unchecked and without appeal.

It is said by Burns, not of surveyors and notaries, but of justices, “the power of a justice of the peace is in restraint of the common law, therefore, generally, nothing shall be presumed in favor of the office of a J. P., but the indictment will be against it.” In trials without jury, he must proceed according to the methods of the common law; “so that if he shall be called to account upon *habeas corpus* for the same by a superior court, it may appear that he hath

conformed to the law." 1 Burns' Justice, p. 373; Hening's J., p. 134; Davis' Crim. Law, p. 387. A doubt never entered the mind of an English judge as to his power to review a justice's commitment for contempt. In Brass Crosby's case, 3 Wils., 188, it was said (*arguendo*), "the court must judge of the cause of commitment returned, if not, why should the writ command the return of the cause?—the cause is returned that the court may judge whether the person is entitled to his liberty or not." And for this, 4th Inst., 434, 12 Rep., 83, and Vaughan, 135, were cited. This position was not controverted in the opinion pronounced by the court, but the decision in that case was based solely upon the fact that commitments for contempt by superior courts could not be reviewed by *habeas corpus*. It was not pretended that inferior tribunals were not amenable to the courts of Westminster Hall. "No other court shall scan the judgment of a superior court, or the principal seat of justice; it would occasion the utmost confusion if every court of this Hall should have power to examine the commitments of the other courts of the Hall for contempts," said Blackstone in that case. And so in every case, it will be found that where the courts of England refuse to interfere, they have been restrained by comity toward their equals, but neither a case or a dictum can be found which extends that comity to justices' commitments for contempts.

In 2 Hank. P. C. B. 2, p. 173, it is said of the K. B., that it may upon *habeas corpus*, in its discretion, deliver any person "unjustly or hardly deprived of his liberty by any inferior court." And when it is taken for granted by the writer, that in case of commitment for contempt by a "mayor, or justice, or other inferior magistrate, where no cause is shown in the warrant," that the K. B. would bail. Even in cases where fines were imposed by "a sessions of justices of the peace," and the defendants committed, he assumes, that unless it appears by the record that they were properly imposed, the parties would be discharged—§ 77. In § 81, the general rule is laid down, which applies as well to the other courts of Westminster Hall as to the K. B., viz: "that they may award either in term time or vacation a *habeas corpus* by the common law for any person committed for any cause under treason or felony, and thereupon discharge him, if it shall clearly appear by the return that the commitment was against law—as being made by one who had no jurisdiction, or for a matter for which by law no man ought to be punished."

All these authorities—let it be remembered—apply to a

system, under which the *return* to the writ is conclusive and not traversable, so that the range of enquiry into the cause of commitment is of necessity restricted. While in Virginia not only is the return not conclusive, but any facts touching the cause of imprisonment may be proved, and are to be recorded if required. If, therefore, after the investigation here, the court is satisfied that the witness ought not to have been committed, it remains to determine only, whether the court will remand him to an imprisonment confessedly illegal, and from which there is no escape, or discharge him. We are authorized to infer, from the court's desire to hear this point argued, that it is of opinion that the witness ought not to have been committed, and if this be so, will the court consign him to jail with a knowledge that he should by law enjoy his liberty? Especially when by stat. chap. 96 of the Code, this court possesses all the powers exercised by the English courts. It cannot be that a Virginia court will remand into unlawful custody for fear of infringing upon the powers of a justice of the peace.

Young, for Commonwealth.

The commitment of the justices for the failure to answer cannot be reviewed upon a *habeas corpus*. One court cannot review by *habeas corpus* the commitment by another court, for contempt, otherwise the administration of justice could be at any time impeded by the mere will of the witness. The Code, p. 664, sec. 23, arms the court with the power to commit the witness until he does answer; and all the powers conferred upon a court by this section are equally conferred upon a justice. The justice has the right to exercise the same authority, on this subject, as *the court*. The argument upon the other side then, must come up to the point that the proceeding of a court committing a witness for contempt may be reviewed upon *habeas corpus*. No authority has been introduced on the other side for such a power.

But it is argued that the Code, p. 779, sec. 4, gives a remedy by writ of error, in cases of contempts from decisions of courts of record, and that as a justice is not a court of record and no writ of error can lie from his decision, the power must exist to review them by *habeas corpus*, else the witness would be remediless. If this were true, the conclusion would by no means follow, for there are many errors which cannot be corrected, and for which the *habeas corpus* affords no remedy. But the statute does not give a *writ of error* from the decision of a court of record in cases like this. The classes of contempts intended to be embraced in the sec-

tion above cited are specified on p. 737, sec. 24, of the code. These do not *necessarily* impede the administration of justice, nor *stop* the trial of a case. Here the contempt stops the whole case. When committed for this, is it contended that the witness can arrest the proceedings by excepting to the order committing him, and make himself a party to the record by requiring the court to sign a bill of exceptions, and cause the case under trial to be suspended until he can get his writ of error and have it tried in an appellate court? The witness in such a case could have no remedy by writ of error, and therefore, unless he has a remedy by *habeas corpus* from the commitment of a court of record, he is equally without remedy, as in this case; and, if the remedy by *habeas corpus* does not exist in the former case, there is no reason why it should lie in the latter. The cases in which a *habeas corpus* would properly lie are those in which the court or justice acted in a matter without their jurisdiction, or where within their jurisdiction they exceeded their powers. For instance, punishing by confinement, where the power was only to fine, or inflicting a longer, or other imprisonment than the law allows. But where the court or justice exercises a clearly granted jurisdiction and does not transcend it, they are from the necessity of the case, the exclusive judges of the propriety of its exercise, unless the statute gives a remedy by appeal.

Mr. Lyons closed the case for the applicant.*

MEREDITH, J.

This is a proceeding under a writ of *habeas corpus* to bring the body of Roger A. Pryor before a circuit Judge in vacation, for the purpose of inquiring into the legality of his confinement in jail. The petition and return show that he is detained in prison by virtue of a warrant of commitment issued by two justices of the county of Henrico, for refusing to answer certain questions propounded to him as a witness, during their investigation of an alleged criminal offence.

The first question, and one of most difficulty is, whether I have authority under a writ of *habeas corpus*, to reverse or in any manner revise the action of the justices of Henrico, who committed the applicant for refusing to answer upon the examination before them, certain questions touching a supposed criminal offence, upon the ground that the answers to such questions might tend to involve him in a criminal prosecution.

The justices by the act of assembly have full power to commit

* We have not been able to procure his notes. [Ed.]

for a contempt, a witness who either refuses to be sworn, or when sworn, refuses to answer, Code, ch. 211, § 2, p. 784. The only question therefore upon this part of the case is whether, if they have erroneously decided in committing the applicant, and the return shows that the committal was erroneous, I can, upon that return, review the justices' decision and correct the error.

The question can never arise where the commitment is by a court of competent jurisdiction. The judgment of such a tribunal is, from its very nature, conclusive, however erroneous it may be, until reversed; and it can only be reversed by writ of error, or in some other mode prescribed by law. But a writ of habeas corpus is not a writ of error. It cannot bring the case before the court awarding it in such a manner that the court can exercise any kind of appellate jurisdiction. Under the writ of habeas corpus the body of the applicant is brought up with the cause of detention, and the court can undoubtedly enquire into the sufficiency of that cause; but if it be the judgment of a court having general jurisdiction of the subject, that judgment is in itself sufficient cause, however erroneous it may be, and however plain it may be that it ought to be reversed on appeal or writ of error. It is only where the judgment is a nullity that it can be disregarded, reversed, or set aside by a proceeding on a writ of habeas corpus; and it is only a nullity when it is entered by a court not having general jurisdiction of the subject. Such a judgment is a nullity, and may therefore be disregarded on a writ of habeas corpus. 3 Peters 202. Tobias Watkins' case.

But such is not the case here. The party is not detained by the judgment of a court, but by a warrant of commitment, issued by two justices of the peace, engaged in the investigation of an alleged criminal offence. When so engaged they do not constitute a court in any sense, certainly not in that sense and meaning of the term which would prevent a review of their proceedings, and a reversal if erroneous. The court, whose judgment is to have such a conclusive effect, must, in my opinion, be a court of record; and its decisions as recorded, the subject of review by appeal or writ of error. We have no other courts than courts of record. But a single justice sitting in such an examination as this, is not a court of record, and his decision can not be reviewed or reversed by appeal or writ of error. So that unless the writ of habeas corpus will enable a party committed, as the applicant here is, to bring his case before a different tribunal, he is utterly without remedy, notwithstanding he may be unlawfully detained in custody. It seems to me, therefore, that this case is precisely one of those anomalous cases, where a party, being detained in custody unlawfully, the ordinary process of the courts fails to relieve, and he is entitled to this extraordinary

ry process, to secure his discharge from his illegal detention. There are no authorities upon this branch of the subject in our own courts defining the powers of the courts in proceedings under writs of habeas corpus over acts done by justices of the peace, and we must turn to the English decisions in analagous cases. I find upon examination of the English authorities, that, in numerous cases their courts have exercised the power on writs of habeas corpus, of reviewing and reversing the committals of single justices; and that according to the circumstances disclosed by the evidence and shewn by the returns to the writs, the reviewing judges have discharged or remanded the applicants.

On the return to the writ of habeas corpus, after hearing the evidence and looking into the warrant of commitment issued by the justice, if the court be of opinion that there was no pretence for imputing to the prisoner any indictable offence, it will discharge him, 14 East. 82-95; though this power is cautiously and rarely exercised. If the commitment be palpably arbitrary, unjust and contrary to law, the court will discharge, or at least bail the prisoners, 14 East. 140. If the warrant of commitment be informal, and the court upon hearing the evidence is satisfied that an offence has been committed, it will send the party before a justice with the witnesses, that he may be more formally committed, 1 Bar. & Cress. 258; 3 East. 157. In the Supreme Court of the United States it has been decided that, on a writ of habeas corpus, the court will inquire whether the warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offence, and will hear the evidence and judge of its sufficiency to that extent. *United States v. Johns*, 4 Dallas 413; and if the warrant does not state some good and certain cause, supported by oath, it is illegal, and the court on a writ of habeas corpus, will discharge the prisoner. *Ex parte Burford*, 3 Cranch 447.

These cases clearly show that, on a habeas corpus, the court is not concluded by the warrant of a justice of the peace committing a party; but that it may look behind the warrant, examine its formality, hear the testimony on which it is founded, and pass upon the legality of the proceedings. Thus showing that on a writ of habeas corpus the warrant of a justice has not the conclusive effect that the judgment of a court of competent jurisdiction has.

But it may be said that this is a commitment for contempt, and is distinguishable from an ordinary warrant of commitment, initiating a criminal prosecution. It is true, that contempt of court is a distinct criminal offence. The contempt may be committed in some particular cause, or it may consist in misbehaviour, which has a tendency to obstruct the administration of

justice generally. When it is committed in a pending cause, the proceeding to punish it, is a proceeding by itself. It is punished sometimes by indictment, sometimes by a summary proceeding prescribed by statute, as was done in this case. In either mode of proceeding, the party is tried, found guilty, and where committed is in execution of the judgment, 7 Wheat. 38; and if it be the judgment of a court of record, is final and conclusive, on all other courts, until reversed by a writ of error in the mode prescribed by our statute. But if the commitment for contempt be by a judgment of a single justice, it does not stand on any higher footing than any other commitment by a justice. It may be inquired into on a writ of habeas corpus, and if illegal, the party discharged from confinement. The English Reports furnish many cases in which the courts have discharged parties on writs of habeas corpus, who were committed by justices for contempts to them when performing their official duties. In the case of *The King v. James*, 5 Barn. & Ald. 894, a party, who had been committed on the warrant of two justices, for using offensive language to them whilst engaged in the performance of an official duty, was brought before the court of King's Bench by habeas corpus, and was discharged because the commitment was illegal. The same principle was recognised in 1 Dowl. & Ry. 559; Marsh. 377; 7 Taunt. 63; 3 B. & C. 409; 2 Bingham. 488.

It being clear from these cases that, on a writ of habeas corpus the court is not concluded by a warrant of commitment, issued by a justice, even for a contempt, but that the court may look behind it, and inquire into its legality, the question then arises, whether in this case, the commitment is illegal, and the party detained by unlawful authority.

The first point discussed on this branch of the case was, whether a justice has power, without complaints made before him on oath of the commission of an offence, and without issuing a warrant of arrest, to compel witnesses to attend before him, and to require them to give testimony. In my opinion this authority is clearly given them by the act, Code of Va., ch. 204, § 2, p. 761. This act authorizes the justice in cases of this kind, before issuing a warrant of arrest, to examine not only a complainant, but *other witnesses*. If they have power to examine witnesses, all the incidents necessary to its successful exercise are conferred with it, viz: the power to coerce the attendance of witnesses, and to compel them to testify, and upon their refusal to commit them for contempt. Upon such examination the justice, "if he see good reason to believe that an offence has been committed, shall issue his warrant" of arrest. Thus showing that the examination of the complainant and "other witnesses"

is authorized before the warrant of arrest is issued. The proceeding then, in this case by the justices is, in that respect, regular and legal.

The remaining point raised by the counsel of Mr. Pryor, and the one most discussed is, whether or not the questions propounded to him, and for refusing to answer which he was committed, were such questions as the justice had a right to ask, and the witness, claiming his privilege, could be legally compelled to answer?

Upon this question, the counsel who have argued, and fully and ably argued this case, have differed very widely. One of the counsel representing the Commonwealth contending that the witness should be compelled to answer every question, the answer to which would not form a link in the chain of evidence against him to convict him of a criminal offence, and that the court must be the judge and the sole judge of the effect or tendency of such answer.

On the other hand, one of the counsel for the applicant contended that, the witness must be and necessarily was the sole judge of the effect of his answer, and if, in his opinion, the answer would tend to criminate him in any way, or might open the door to the introduction of other evidence, which might tend to criminate him, he had the absolute right to refuse to answer, and the court no legal authority to compel him to make such disclosure.

I do not agree with either extreme of these opinions. I think that the decision of the legality of the question in this case, as in every other case, belongs to the province of the court, and the court must decide it from all the circumstances developed before it.

That no man is bound to criminate himself is a settled maxim of the law, and forms an exception to the general rule, that a witness is bound to disclose all he knows touching the subject under examination before the court. The principle is a simple one, but like all legal principles, its difficulty consists in applying it to a particular case. An examination of the English authorities will show that the courts have not laid down any general rule to guide in its application, and that in each case in which the question has arisen, it has been decided according to the facts disclosed in that case. From these authorities I understand the rule to be that it is the province of the court to consider and decide the question. When the question is propounded, and the witness claims his privilege, and the court perceives that a direct answer to the question cannot implicate the witness, it will compel him to answer; and in such cases it does not consider itself concluded by the oath of the witness. Such was the

decision of C. J. Marshall in Burr's trial, vol. 1, p. 243. The like principle was recognised in the case of *The People v. Mather*, 4 Wend. 252, and *The King v. Slaney*, 5 Car. & Pay. 213. In each of these cases the court compelled the witness to answer the question, although he stated under oath that he believed his answer would implicate him. Yet it is evident from the facts disclosed in these cases that, the court could clearly perceive that the direct answer would not implicate the witness, and therefore it overruled his privilege and required him to answer. But if the answer has a tendency to criminate the witness, or may criminate him, and the court is unable to see that it will not have that effect, it will allow his privilege and not compel him to answer. In Burr's trial, vol. 1, p. 244, Chief Justice Marshall said: "It follows necessarily then, from this statement of things, that if the question be of such a description that an answer to it *may or may not* criminate the witness, according to the purport of that answer, it must rest with himself, who alone could tell what it would be, to answer the question or not. If, in such a case, he say upon his oath, that his answer would criminate him, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath, and it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received." To the same effect are the cases of *The Queen v. Douglas*, 41 Eng. C. L. Rep. 110, and *Ronald v. Fisher*, 74 Eng. C. L. Rep. 761.

Nor is it necessary that the court should see how the answer would implicate the witness. To enable the court to do so, it would have to require the witness to disclose the very fact which his privilege is designed to withhold. In *Mather's case*, Marcy Judge, said: "if the court think the answer *may* in any way criminate him, it must allow his privilege, without exacting from him to explain how he would be criminated by the answer, which the truth may oblige him to give. If the witness was obliged to show how the effect is produced, the protection would at once be annihilated. The means which he would be in that case compelled to use to obtain protection, would involve the surrender of the very object for the security of which the protection was sought."

It is evident from these authorities that, in that class of cases, in which the question propounded has a *tendency* to criminate the witness, or *may criminate* him, and the court is unable to perceive that it will not have that effect, great weight is given to the oath of the witness; but if the witness, claiming this privilege were impeached by other testimony, or there were any thing in his conduct and bearing before the court calculated to

discredit him in its estimation, it would cautiously recognise his privilege, if it did wholly disregard it. I am not prepared to say, nor is it necessary in this case that I should decide, that the statement alone of the witness under oath, that, he believes the answer will criminate him, is sufficient to justify the court in not requiring an answer. No English case has gone to that extent, though Maule, Judge, in the case of *Ronald v. Fisher*, above cited, has expressed that opinion, and it would be difficult to place any other interpretation upon Judge Marshall's decision in Burr's trial. And it seems to have been so held in the case of *The State v. Edwards*, 2 Nott & McCord, p. 13.

It was insisted by one of the counsel for the prosecution that unless there appears to the court reasonable ground to believe the answer will criminate the witness, it will compel him to answer; and *The Queen v. Garbett*, 5 Brit. Cr. Cases 262, is relied on to sustain this position. It is true the court said that in *this case* it appeared there was reasonable ground to believe that the witness would criminate himself, and therefore he should not be required to answer. But they did not decide that reasonable ground in addition to the oath of the witness must be shown in every case to entitle the witness to the privilege. In delivering their opinion, they say that "they did not decide, as the case did not call for it, whether the mere declaration of the witness on oath, that he believed that the answer would tend to criminate, would or would not be sufficient to protect him from answering where sufficient other circumstances did not appear in the case to induce the Judge to believe that it would not." The reservation of this question for future adjudication, where it should arise, was entirely unnecessary, if the principle contended for by the counsel had been settled by this decision. Reasonable ground appeared in the case, and hence the court held that the Judge below erred in compelling the witness to answer. The principle contended for by the counsel was not decided in this case, and if it had been, would be in conflict with the cases above cited.

It was further insisted on the part of the prosecution that the court would compel the witness to answer, unless the fact sought to be obtained by the answer would, in the opinion of the court, form a link in the chain of testimony necessary to convict the witness. In other words, if the witness were convicted of the crime and that fact was not proved on trial, the court would, on motion, award a new trial, on the ground that the testimony was insufficient to sustain the verdict. If this principle were true, and furnished the sole guide for the court in deciding when to recognise the privilege of the witness, it would be necessary for the court to know what criminal prosecution it is which the wit-

ness fears his answer would subject him to, and must further perceive every fact which it would be necessary to prove in order to convict him. This principle would require the court to possess information for its guide, which it has no means to procure. It is well settled by the cases cited, that it is not necessary for the court to see how the answer will criminate the witness before it will allow his privilege; and it is equally well settled that the witness cannot be required to disclose how the answer may implicate him; and yet without this information the court could not apply the principle contended for, and thus the rule that a witness shall not be compelled to criminate himself, would be of no practical benefit; because the court, acting on the principle contended for, being unable to see that the answer would form a link in the chain of testimony against the witness, and having no means of procuring the information that would show the effect of the answer on the witness, would compel him to answer, and thus, in many cases, obtain testimony from the witness which would criminate himself. The rule has no such narrow application, and is repudiated by the reason upon which it is founded, and is in conflict with the cases above cited. In many of these, especially the one in 41st Eng. C. L. Rep., it was impossible for the court, where it allowed the privilege, to see that the answer would disclose a fact which would form a link in the chain of testimony against the witness. The opinion of Judge Marshall in Burr's trial, was relied on as authority for this position. It is true, that Judge Marshall, in his opinion, uses the expression, "a link in the chain of testimony." But the expression, to be understood, must be taken in connection with the purpose for which it was used. He used it in replying to the argument of the counsel for the prosecution. It had been contended in that case by the counsel for the prosecution, that the witness would only be allowed his privilege, when his answer, unconnected with other testimony, would be sufficient to convict him of a crime. In replying to this narrow operation sought to be given to the rule, Judge Marshall said that it might be as necessary for the protection of the witness to allow him to withhold a single fact, forming a link in the chain of testimony against him, as it was to allow him to withhold all the facts, for without that fact he could not be convicted, and if made to declare that fact, would convict himself as effectually, as if made to declare all the facts. He added, "the rule which declares that no man shall be compelled to accuse himself, would *most obviously* be infringed, by compelling a witness to disclose a fact of *this description*." But he did not mean to confine the rule to cases where there was an obvious infraction of it, and to facts of that description; for he had also in a previous part of the

opinion held that, if the answer may criminate the witness, although the court could not see how it would do so, it would allow his privilege, if he claimed it. The same expression had been used by Lord Eldon, in the case of *Paxton v. Douglass*, 16 Ves. 239. It is evident that he did not mean to give the rule this restricted operation; for he expressly declares that, "if it is one step having a tendency to criminate him, he is not compelled to answer." I am decidedly of opinion that the application of the rule is not confined to those obvious cases in which the fact sought to be obtained by the answer would, in the opinion of the court, form a link in the chain of testimony necessary to convict the witness.

The act, Code of Va., ch. 199, § 22, p. 752, which provides that in a criminal prosecution evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, was cited on the part of the prosecution, and it was insisted, had materially modified the common law rule, that no man is bound to criminate himself. It is evident from the terms of the act, that it was the object of the act to restrict the use to be made of testimony already obtained, and not to prescribe a new mode of procuring testimony. Before the passage of the act such statements could be used against a witness. The act forbids their use. It was designed to protect the witness against statements made by him upon a legal examination, either voluntarily or through ignorance of his rights, or from inadvertence. But it was not intended to enlarge the power of the court to compel a witness to disclose any matter which before its enactment he had the right to withhold. Such a construction would be the result of inference or implication, and not warranted by the plain import of the terms used in the act.

Having then endeavoured to deduce from the authorities the principles settled by them, it only remains to apply them to the case before me. It is admitted that a duel has been fought; it constitutes the offence, which the witness fears his answers to the questions propounded may implicate him in. He states under oath that he believes his answers will criminate him. He fully comprehends his position and the solemnity of the statement he makes. He is advised by able and honourable counsel not to answer, because he may criminate himself. There was nothing shown before the justices to impeach the witness, or in any manner to discredit his statement. He has answered all the questions which would not tend to criminate him. All the questions which he refuses to answer, point to this duel, and are propounded for the avowed purpose of acquiring information about it. The answers to these questions may criminate the witness, though the court cannot see as to some of the answers

how they will have that effect; yet it cannot see as to any of them that they will not have that effect. The witness, therefore, should be allowed his privilege, and not compelled to answer.

In conclusion, then, I am of opinion, that the justices erred in requiring the witness to answer the questions objected to, that their commitment of him for his refusal to answer was illegal, and consequently he must be discharged.

JURISDICTION. PLEADING. INFORMATION.

Commonwealth v. Sanders.

In the Circuit Court of Wythe County, Va. October Term—1858.

A circ it court has no jurisdiction of the offence of permitting a slave to go at large, and trade as a freeman; or if it has any such jurisdiction, the proceeding can only be by way of *information* and not of *indictment*. Want of jurisdiction in the court may be taken advantage of by motion in arrest of judgment, even after verdict.

This was an indictment against *James Sanders*, found at October Term 1857, charging that he “did permit *Ambrose*, a slave under his control, to go at large and trade as a freeman.” The defendant pleaded *not guilty*. A jury was at this term, empannelled; and found the defendant guilty, and assessed his fine at \$10. After the verdict he moved in arrest of judgment, alleging as the ground of error “that this honorable court has no jurisdiction to try the defendant for the offence charged in the indictment, or to render any judgment upon the verdict found by the jury.”

Kent, Commonwealth's Attorney.

Floyd & Cook, for the defendant.

FULKERSON, J. (sitting for Judge *Fulton*.)

This indictment, if it have any foundation at all, can only rest upon the 6th and 7th sections of chap. 104, of the Code, found at page 460. Sec. 6, enacts that any person permitting a slave under his control to go at large and trade as a free man, or hire himself out, shall forfeit not less than ten nor more than thirty dollars. The section immediately following declares the mode in which this forfeiture shall be enforced. It provides that the *negro* shall be arrested and carried before a justice, who shall

commit *him* to jail, unless security be given to have *him* forthcoming to abide the result of the prosecution. The justice is to give notice of the facts to the Commonwealth's Attorney, in the *county or corporation court*, and *that court*, if the facts be proved, is to impose upon the master a fine of not less than \$10 nor more than \$30, or at its discretion may direct an information to be filed against him; and in either event if the fine and costs be not paid, may order the negro to be sold.

Upon looking to the law as it stood prior to the enactment of the present Code, I find it very much like the provisions now under consideration. It is found in the Revised Code of 1819, vol. 1, p. 442 secs. 80, 81, 82. Those provisions have undergone judicial investigation, and it has been held, by the supreme criminal tribunal, that under them the circuit courts have no jurisdiction over this subject. See *Moore's case*, 2 Virg. Cases, 155; *Abraham's case*, 1st Rob. Rep. 675.

Having enacted a law so similar to the old statute, I am compelled to suppose that the legislature intended to adopt the construction upon the old law.

But aside from any authority, I can see nothing in this statute which can enable this court to take jurisdiction of its subject matter. The mode of proceeding is fully and carefully pointed out. The whole matter is, in so many words, committed to justices of the peace and the county courts. No indictment is required as a preliminary step in the prosecution: no jury is called on to pass upon the subject. It is discretionary with the county court, whether to order an information to be filed: it is not bound so to do. But even if the county court was obliged to order the filing of an information, it would only direct it to be filed for trial *at its own bar*. It certainly could not direct an information to be filed in *this court*.

I am of opinion that this court has no jurisdiction of the subject, and must therefore arrest judgment.

Ordered accordingly.

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